CITE BY TITLE AND SECTION

e. g. 11 Am. Jur., Commerce, § ———

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AMERICAN JURISPRUDENCE

A COMPREHENSIVE TEXT STATEMENT OF AMERICAN CASE LAW, AS DEVELOPED IN THE CASES AND ANNOTATIONS IN THE ANNOTATED REPORTS SYSTEM, BEING A RE-WRITING OF *Ruling Case Law* TO REFLECT THE MODERN DEVELOPMENTS OF THE LAW

By the Editorial Staff
of the Publishers

Volume 11

COMMERCE
TO
CONSTITUTIONAL LAW, §§ 1-382

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men's association rents a hearse and carriages to a customer to be used at a funeral, but upon learning that the person in charge is a nonunion liveryman, in accordance with the rules of the association, withdraws the vehicles just as they are about to be used in order to demonstrate the power of the association to punish independent liverymen and persons dealing with them.[3] However, exemplary damages in an action for conspiracy can be awarded only against those who were actuated by the malicious motives which justify the imposition of such damages.[4]

§ 59. Verdict and Judgment.—Under the now obsolete common-law writ of conspiracy,[5] it was essential that at least two persons be joined and found guilty.[6] Since the gist of the modern civil action of conspiracy, however, is the damage and not the combination,[7] the authorities sustain the proposition that ordinarily a verdict may be rendered against one of the defendants even though no conspiracy is proved.[8] However, if all of the parties are joined as defendants, a verdict in favor of all but one would necessarily negative the existence of the conspiracy. The question as to whether a verdict may be rendered against that one depends upon the nature of the act proved and the consequent damage to the plaintiff.[9] A recovery cannot be had against one of the defendants alone if the injury is such as could have been caused only by two or more of the defendants acting in concert.[10] For example, in an action against a railroad company and members of a labor union for conspiring to expel, and effecting the expulsion of, the plaintiff from the union, a verdict against the railroad company alone cannot be permitted to stand, since it could not have caused the injury unaided.[11] If an injunction is sought to restrain interference by a labor union with the conduct of the business of an employer, the relief granted should be confined to the wrongful acts which are the basis of the action. It should not extend to prevent interference beyond the immediate future, since there is no presumption that the defendants will engage in similar wrongful acts in the future. If they do so, this must be pleaded and proved before such acts can be the ground for relief.[12]

[3] Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L.R.A. 475, 80 Am. St. Rep. 17.

[4] Boutwell v. Marr, 71 Vt. 1, 42 A. 607, 43 L.R.A. 803, 76 Am. St. Rep. 746 (boycott by business men's association).

[5] See supra, § 53.

[6] Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Auto Workers' Temple Asso. v. Janson, 227 Mich. 430, 198 N. W. 992, citing R. C. L.

[7] Auto Workers' Temple Asso. v. Janson, 227 Mich. 430, 198 N. W. 992, citing R. C. L.; Ratcliffe v. Walker, 117 Va. 569, 85 S. E. 575, Ann. Cas. 1917E, 1022, citing R. C. L.
See supra, § 45.

[8] Gordon v. McLearn, 123 Ark. 496, 185 S. W. 803, Ann. Cas. 1918A, 482; McClintock v. McClure, 171 Ky. 714, 188 S. W. 867, Ann. Cas. 1918E, 96; Boston v. Simmons, 150 Mass. 463, 23 N. E. 210, 6 L.R.A. 629, 15 Am. St. Rep. 230; Auto Workers' Temple Asso. v. Janson, 227 Mich. 430, 198 N. W. 992, citing R. C. L.; Louis Kamm v. Flink, 113 N. J. L. 582, 175 A. 62, 99 A.L.R. 1; Van Horn v. Van Horn, 52 N. J. L. 284, 20 A. 485, 10 L.R.A. 184; Ratcliffe v. Walker, 117 Va. 569, 85 S. E. 575, Ann. Cas. 1917E, 1022.
Annotation: 45 L.R.A. 39; 14 Ann. Cas. 1144, 1145; 19 Ann. Cas. 1254.

[9] Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Auto Workers' Temple Asso. v. Janson, 227 Mich. 430, 198 N. W. 992, citing R. C. L.
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[10] Auto Workers' Temple Asso. v. Janson, 227 Mich. 430, 198 N. W. 992, citing R. C. L.
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(Outline continued in Volume 12)

I. INTRODUCTORY

A. In General

§ 1. Scope.—This article discusses generally all basic principles relating to constitutional law. A general survey of the American constitutional system and the fundamental doctrines which underlie it forms the introduction of the discussion to follow. Included also is an exhaustive treatment of principles relating to the adoption, amendment, effect, and construction of American Constitutions.

The article deals in detail with the general principles as to the constitutionality of statutes. Included are discussions as to the powers and duties of the courts with reference to the validity of legislation, the courts in which constitutional questions are determined and the effect of the decisions of one court upon the decisions of another, the interest necessary to raise constitutional questions, the mode and manner of raising them, and all rules relating to presumptions of constitutionality. The effect of invalidity or partial invalidity is treated in detail.

It has been the purpose to treat herein general principles as to the distribution of governmental powers both as between the Federal and state governments and as among the various departments of government.

All general rules as to the police power are treated herein together with the correlation between police regulation and constitutional rights.

The article discusses general rules relating to constitutional rights and guaranties, such as the rights secured by bills of rights, fundamental rights, privileges and immunities of citizenship, ex post facto and retrospective laws, the obligation of contracts, certain matters relating to full faith and credit apart from the full faith and credit to be extended to judgments, and the general guaranties of the equal protection of the laws and due process of law. It is not the purpose of the article to treat in detail the bearing of Constitutions on all the many matters with which they deal, but to consider the subject in its broader aspect.

A reader who is concerned with the constitutionality of legislation or governmental activity pertaining to the regulation of a particular subject should consult the specific title involved, since each title of this work treats in detail such constitutional questions as are directly connected with its subject matter.

§ 2. Definitions of Constitution; Constitutional Law.—A Constitution is a system of fundamental laws or principles for the government of a nation, society, corporation, or other aggregation of individuals and it may be either written or unwritten.[1] In the United States, the word "constitution," as applied to the organization of the Federal and state governments, always implies a writing and it is understood in the further restricted sense of an enactment by the

[1] State v. Griswold, 67 Conn. 290, 34 A. 1046, 33 L.R.A. 227; State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; State ex rel. Atty-Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established." Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857.

The Constitution of a state is the fundamental law of the state. Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568.

"The Constitution is the fundamental law of the state, in opposition to which any other law or any direction or order must be inoperative and void." Asplund v. Hannett, 31 N. M. 641, 249 P. 1074, 58 A.L.R. 573.

"Constitutional provisions and amendments to the Constitution relate to the fundamental law and certain fixed first principles upon which governments are founded. Constitutions are commonly called the organic law of a state." State ex rel. Halliburton v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639.

direct action of the people providing for the form of government and defining the powers of the several departments, thus creating a fundamental law which is absolute and unalterable except by the authority from which it emanated.[2] A state Constitution has been aptly termed a legislative act by the people themselves in their sovereign capacity and, therefore, the paramount law. It has again been defined to be "an act of extraordinary legislation by which the people establish the structure and mechanism of their government."[3] In short, the Constitution is the charter creating the government.[4]

Constitutional law, due to the American governmental system, occupies an important position in the jurisprudence of this country. It deals, of course, with the interpretation and construction of Constitutions and the application of the fundamental law to statutes and other public acts. It has been said that constitutional law, in the form which it has taken in the United States, is an American graft on English jurisprudence. Its principles and rules are mainly the outgrowth of the development of this country and the states. These principles rest upon the fundamental conception of a supreme law, expressed in written form, in accordance with which all private rights must be determined and all public authority administered.[5]

The Supreme Court has stated that constitutional law is to a certain extent a progressive science.[6]

B. Nature and Purposes of Constitutions

1. Nature

§ 3. Generally; Distinctions from Statutes.—A Constitution differs from a statute in that a statute must provide, at least to a certain degree, the details of the subject of which it treats, whereas a Constitution usually states general principles and builds the substantial foundation and general framework of the law and government.[7] Statutes are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state. It is an important characteristic of such laws that they are tentative, occasional, and in the nature of temporary expedients. Constitutions, on the other hand, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity

[2] Cline v. State, 36 Tex. Crim. Rep. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

"In our system of government a written Constitution is the highest expression of law." Re Denny, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722.

"In its most general sense, a Constitution is defined as 'that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.' Cooley, Const. Lim. 2. . . . 'A Constitution, in the American sense of the word, is a written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among several departments, for their safe and useful exercise, for the benefit of the body politic.' [Miller, Const. (U. S.) 70]." Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

A Constitution is designated as a supreme enactment, a fundamental act of legislation by the people of the state. A Constitution is legislation direct from the people, acting in their sovereign capacity, while a statute is legislation from their representatives, subject to limitations prescribed by the superior authority. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, appeal dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Sage v. New York, 154 N. Y. 61, 47 N. E. 1096, 38 L.R.A. 606, 61 Am. St. Rep. 592.

[3] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, appeal dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[4] State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706.

[5] State v. Main, 69 Conn. 123, 37 A. 80, 36 L.R.A. 623, 61 Am. St. Rep. 30.

[6] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. W. 115, 3 A.L.R. 1260.

[7] State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560.

and continued existence. Constitutions are primary, being the commands of the sovereign establishing the governmental machine and the most general rules for its operation. Statutes are secondary, being commands of the sovereign having reference to the exigencies of time and place resulting from the ordinary working of the machine.[8]

In some respects a constitutional provision is a higher form of statutory law, which the people may provide shall be self-executing where the object is to put it beyond the power of the legislature to render such provision nugatory by refusing to pass laws to carry it into effect.[9] It is a means of compelling legislative action.[10] It should be noticed, however, that a statute and a Constitution, though of unequal dignity, are both "laws" and each rests upon the will of the people,[11] and that for many reasons, especially with reference to the clause of the Federal Constitution forbidding impairment of the obligation of a contract by the laws of the states,[12] the Constitution of a state is one of the laws of the state.[13]

§ 4. Permanency and Generality.—Two of the outstanding characteristics of any American Constitution are permanency and generality. A Constitution is intended not merely to meet existing conditions, but to govern the future.[14] It has been said that the term "constitution" implies an instrument of a permanent nature.[15]

Since it is recognized that the framers of a Constitution cannot anticipate conditions which may arise thereafter in the progress of the nation[16] or establish all the law which from time to time may be necessary to conform to the changing conditions of a community,[17] as a rule a Constitution does not deal in details, but enunciates the general principles and general directions which are intended to apply to all new facts that may come into being and which may be brought within these general principles or directions.[18] It would not be practi-

[8] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, appeal dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[9] Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.
Annotation: Ann. Cas. 1914C, 1117.
See also infra, §§ 71 et seq.

[10] State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860.

[11] State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723.

[12] See Vol. 12, Subd. XI.

[13] Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

[14] Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; Ex parte Woods, 52 Tex. Crim. Rep. 575, 108 S. W. 1171, 16 L.R.A.(N.S.) 450, 124 Am. St. Rep. 1107; Tomlinson v. Cunningham, 106 W. Va. 1, 144 S. E. 570, citing R. C. L.
The Constitution of the United States was made for an undefined and expanding future. Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

The Constitution was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages. Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

[15] Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; State ex rel. Atty.-Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517.
"The Constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife and storms, or a rock in the ocean amidst the raging of the waves." Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857.

[16] United States Bank v. Deveaux, 5 Cranch (U. S.) 61, 3 L. ed. 38; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183.

[17] Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.

[18] Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Smith

cable in a written Constitution to specify in detail all its objects and purposes or the means by which they are to be carried into effect. Such prolixity in a code designed as a frame of government has never been considered necessary or desirable.[19] It has been pointed out that it would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly and which can be best provided for as they occur, and that it would have deprived the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.[20] An examination, however, of state Constitutions which have been recently adopted, or of amendments which have been adopted in recent times to such Constitutions, discloses a tendency to deal in particular with the matters involved, and to prescribe rules of conduct which in many cases are almost, if not completely, as detailed in prescribing the matters upon which they are to operate as statutes generally are.[21]

It is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking.[1] Although the rigidity of such a written Constitution may at times obstruct progress, its stability is intended to protect the people from frequent and violent fluctuations of public opinion,[2] since the Constitutions, state and Federal, are limitations on the power of the people as against the impulses of mere majorities.[3] A good Constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people—not to the whim of the people or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficacy. Changes in government are to be feared unless the benefit is certain. As Montaigne says: "All great mutations shake and disorder a state. Good does not necessarily succeed evil; another evil may succeed, and a worse."[4]

§ 5. Doctrine of Social Compact.—Occasionally there are to be found in the reports expressions of judicial opinion recognizing the social contract theory as the basis of society and endeavoring to explain by it limitations on the liberty of individuals. Man in a civilized society is contrasted and compared with man

v. Turner, 7 How. 283, 12 L. ed. 702; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; Johnson v. Grand Forks County, 22 N. D. 613, 135 N. W. 179, 125 Am. St. Rep. 662.
A Constitution should not deal with unessential matters or mere rules of order. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39.
The Constitution states general rules and maxims in accordance with which the powers of sovereignty are habitually exercised, rather than particular and specific directions, for the manner and occasion of the exercise of that authority. Gemmer v. State, 163 Ind. 150, 71 N. E. 478, 66 L.R.A. 82.

As to the flexibility to be given to Constitutions in construction, see infra, § 51.

[19] Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, appeal dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[20] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; M'Cullough v. Maryland, 4 Wheat. (U. S.) 316, 5 L. ed. 579; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183.

[21] See provisions of state Constitutions.
As to the principle that constitutional provisions are self-executing when they prescribe a sufficient rule of conduct or method by which rights or duties may be enforced, see infra, §§ 71 et seq.

[1] Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957.

[2] Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156.

[3] Re Duncan, 139 U. S. 449, 35 L. ed. 219, 11 S. Ct. 573; People v. Westchester County Nat. Bank, 231 N. Y. 465, 132 N. E. 241, 15 A.L.R. 1344.

[4] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, appeal dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

in a state of nature.[5] It should be borne in mind, however, that the Supreme Court of the United States has apparently nowhere given its sanction to this doctrine. The utmost which it has said is that every state Constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner and that the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves, as to general objects, in a certain manner.[6]

It is undoubtedly true that the political theories of French philosophers as to the social compact theory of government were well known and approved by many members of the convention which drafted the Constitution of the United States. In the jurisdictions which have accorded approval to this theory it is said that man in his natural state has a right to do whatever he chooses and has the power to do; but that when he becomes a member of organized society under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which may be injurious to his fellow citizens, and that this is the price which he pays for governmental protection.[7] For example, the individual is treated as surrendering in large measure his natural right to self-protection, and in consideration of this surrender he receives the protection of the state.[8]

2. Purposes

§ 6. Generally.—The general purposes of a Constitution are twofold in aspect. One of these fundamental objects is to establish the basis of the governmental system. In this respect the purpose is to prescribe the permanent framework of the system of government, assign to the different departments their respective powers and duties, and establish certain fixed first principles on which government is founded.[9] Where a Constitution asserts a certain right or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law and is full authority for all that is done in pursuance of its provision.[10] The other general purpose of a Constitution is public welfare,[11] which involves the safety, prosperity, health, and happiness of the people. The Supreme Court has appropriately stated that the people of the United States erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence.[12]

§ 7. Preservation of Rights.—One of the great objects of government is to protect the life, liberty, and property of the individual citizens.[13] To this end, and in order that the constitutional system may be a government of laws and

[5] Com. v. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L.R.A.(N.S.) 172, 19 Ann. Cas. 159.

[6] Chisholm v. State, 2 Dall. (U. S.) 419, 1 L. ed. 440; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

[7] Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L.R.A. 576, 16 Am. St. Rep. 396; Com. v. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L.R.A.(N.S.) 172, 19 Ann. Cas. 159; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218.

[8] McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642.

[9] State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.

[10] Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 S. Ct. 210.

[11] Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179.

[12] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L ed. 666, 17 S. Ct. 255; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

[13] Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

As to fundamental principles of life, liberty, etc., see infra, §§ 328 et seq.

not of men,[14] it is customary for Constitutions to limit the powers of the government and thereby operate as bulwarks of liberty for the protection of private rights.[15] Constitutions are intended to preserve practical and substantial rights, and not merely to enunciate theories of government.[16]

It has been said that only on a recognition of the existence of certain inherent rights can free institutions be maintained[17] and that a characteristic feature of our constitutional system lies in the power of a single individual successfully to resist the claims of the whole community when he is in the right.[18] Accordingly, the rights so safeguarded are, within their limitations, inviolate and those granted by the Federal Constitution to one person cannot be infringed in order to prevent violation of law by another person.[19]

Although Constitutions may protect and guard individual rights, such rights do not have their origin and foundation in these instruments.[20] A Constitution is not the beginning of a community.[1] nor does it originate and create institutions of government. Instead, it assumes the existence of an established system which is still to continue in force,[2] and it is based on pre-existing rights, laws, and modes of thought.[3] It has been aptly said that written Constitutions sanctify and confirm great principles, but do not bring them into existence,[4] and that a Constitution is not the cause, but a consequence, of personal and political freedom.[5]

The question may arise as to what rights are preserved and protected. In accordance with the general theory that Constitutions relate to existing institutions, it has been held that the provisions of the Constitution, state or Federal, do not cover rights, privileges, and obligations not specified and not existing or understood at the time of its adoption, or not in force by long acquiescence or by continued official or public approval.[6]

[14] Jones v. Securities & Exch. Commission, 298 U. S. 1, 80 L. ed. 1015, 56 S. Ct. 654; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064.

[15] Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; State v. Arregui, 44 Idaho, 43, 254 P. 788, 52 A.L.R. 463; State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459.

The fundamental law embodies those principles, some in form of declaration, others by way of implied or express prohibition, and some in the form of grant, supposed to be limitations essential to conserve human liberty, security, equality and happiness, and not to be subject to change except in a way calculated to arouse the highest judgment and most efficient deliberate considerate choice. State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[16] Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067, 24 S. Ct. 692.

[17] Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652.

"The Constitution . . . is the protector of the people against injury by the people." Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803.

[18] McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642.

[19] Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. ed. 557, 46 S. Ct. 260, 43 A.L.R. 1224.

[20] State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356, overruled on another point in Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

[1] Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361.

[2] State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143.

[3] State v. Denny, 118 Ind. 449, 21 N. E. 244, 4 L.R.A. 65; Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356, overruled on another point in Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

[4] Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356, overruled on another point in Graham v. Kibble, 9 Neb. 182, 2 N. W. 455.

[5] State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

[6] Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

II. CONSTITUTIONAL SYSTEM

A. In General

§ 8. American System.—The constitutional form of government as it exists in the United States is based on the fundamental conception of a supreme law expressed in written form, in accordance with which all private rights must be determined and all public authority administered.[7] It has been said that constitutional government by the people represents the greatest and grandest struggle of humanity for its betterment and in its accomplishment marks the utter most political accomplishment of the human race.[8] The limitations imposed by the American system of constitutional law on the action of the governments, both state and national, are deemed to be essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions.[9] In the United States the right of sovereignty is vested in the people and is exercised through the joint action of the Federal and state governments.[10] Upon entering the Federal Union, the states retained all their original power and sovereignty, except such as was surrendered to the Federal Government.[11]

§ 9. British Theory.—According to the theory of the English Constitution, absolute despotic power must in all governments reside somewhere, and this power is there intrusted to Parliament.[12] Indeed, it has been aptly said that the British Parliament "is at once a legislative and a constitutional convention"[13] and that its power is so transcendent that it cannot be confined, either for causes or persons, within any bounds.[14] This is the prevailing view of the British system at the present time.[15] The Privy Council states: "In the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, still," it is added, "notwithstanding such condemnation the statute in question is the law and must be obeyed."[16] There have been from time to time in the English cases expressions of opinion doubting the omnipotence of Parliament.[17] It has been recognized that Parliament has no general power to legislate for foreigners out of the Dominions and beyond the jurisdiction of the Crown.[18]

An act of a colony of the British Empire may be repugnant to the provisions of an act of Parliament extending to the colony, and to the extent of its repugnancy the colonial law may be deemed inoperative.[19] Notwithstanding the occasional expressions to the contrary, most of which are found in the early cases,

[7] See supra, §§ 3, 4.

[8] State v. Superior Ct. 60 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925.

[9] Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 11 S. Ct. 111, 292.

[10] Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450; Bignell v. Cummins, 69 Mont. 294, 222 P. 797, 36 A.L.R. 634; Ex parte Sullivan, 10 Okla. Crim. Rep. 465. 138 P. 815. Ann. Cas. 1916A, 719; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

[11] Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 29 S. Ct. 580; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.
See also infra, § 170.

[12] Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.

[13] State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368.

[14] Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.

[15] See McIlwain "The High Court of Parliament and its Supremacy," pp. 257 et seq.

[16] Webb v. Outrim [1907] A. C. (Eng.) 81, 7 Ann. Cas. 84—P. C.

[17] See Calvin's Case, 7 Coke, 1a, 77 Eng. Reprint, 377, 2 Eng. Rul. Cas. 575.

[18] People v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94.

[19] Webb v. Outrim [1907] A. C. (Eng.) 81, 7 Ann. Cas. 84—P. C.

the settled doctrine is, as stated above, that Parliament is supreme.

The distinction between the American and the British system has been constantly referred to in the American cases.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, but when they formed the National Government, some of these powers were surrendered to the United States,[20] so that at the present time it may be said that a state legislature possesses all the powers of the British Parliament, except so far as those powers have been limited or abrogated by the Federal Constitution or that of the state.[1] By reason of these limitations it is not appropriate to consider the power of the British Parliament as a safe test of the powers of a state legislature.[2]

The principle as to the omnipotence of Parliament has not been directly applied to legislative bodies in America.[3] Thus, it is recognized that the Congress of the United States as a legislative body is not vested with judicial powers like the British Parliament.[4]

B. American System

1. Fundamental Federal Documents

a. United States Constitution

§ 10. Purpose and Effect.—Although the several states were in existence as separate sovereignties prior to the adoption of the Constitution of the United States, the Federal Government established by that instrument is not a league or a confederation of states, but a government of individuals,[5] and in this respect the present government differs from the previously existing Confederation.[6] By the Constitution a nation was brought into being and that instrument was not merely operative to establish a closer union or league of states.[7]

Although common defense is one of the purposes of the Federal Constitution,[8] it was not formed merely to guard the states against danger from foreign nations, but mainly to secure both union and harmony at home and safety against

[20] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

[1] Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A.(N.S.) 244, 20 Ann. Cas. 158; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717; Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; Lansing v. Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State v. Lewis, 142 N. C. 626, 55 S. E. 600, 7 L.R.A.(N.S.) 669, 9 Ann. Cas. 604; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65; Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145; Ex parte Brown, 38 Tex. Crim. Rep. 295, 42 S. W. 554, 70 Am. St. Rep. 743; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625.
Annotation: 62 Am. Dec. 638; 87 Am. Dec. 64.
When a state Constitution, itself, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written Constitution, a legislative enactment on that subject ex proprio vigore carries with it all the force of an act of parliament. Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.(N.S.) 652, Ann. Cas. 1915C, 822.
As to powers of state legislatures generally, see infra, § 193.

[2] People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460.

[3] State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Girdner v. Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700.

[4] Re Christiansen, 17 Utah, 412, 53 P. 1003, 41 L.R.A. 504, 70 Am. St. Rep. 794.

[5] White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

[6] Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

[7] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 S. Ct. 655.

[8] United States v. Schwimmer, 279 U. S. 644, 73 L. ed. 889, 49 S. Ct. 448.

injustice.[9] It was designed for the common and equal benefit of all the people of the United States[10] and its protection extends to those who speak other languages as well as to those who speak English.[11]

Under the American system each state was left free to establish a Constitution for itself, and in that Constitution to provide such limitations and restrictions on the powers of its particular government as its judgment might dictate.[12] In this connection, however, it must be kept constantly in mind that the Federal Constitution is in reality a part of the Constitution of every state and may be so regarded in determining the validity of legislative acts,[13] and that the Constitution and the statutes of a state are to be taken together as making one body of law.[14]

§ 11. —Application to Foreign States.—It may be stated as a general rule that the Federal Constitution has no application to foreign states. For example, the fundamental guaranties of life, liberty, and property, made by the Federal Constitution, such as those relating to the writ of habeas corpus, bills of attainder, ex post facto laws, and trial by jury for crimes, have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. An American citizen who commits a crime in a foreign country cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode is provided for by treaty stipulations between that country and the United States.[15] A similar development of this principle is found in the determination that since the Constitution does not apply to foreign countries or to trials therein conducted, Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury.[16] Nor does the Federal Constitution apply to governmental acts in a territory which becomes American at a later date. Thus, acts of the Texas Congress previous to the annexation cannot be tested by the Federal Constitution.[17]

§ 12. Operation on States and Individuals.—The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but, as the preamble to the Constitution declares, by the people of the United States,[18] and was adopted as their voluntary act for their own protection.[19] Through this adoption they acquiesced in the restrictions on their rights

[9] Ableman v. Booth, 21 How. (U. S.) 506, 16 L. ed. 169; Herman v. Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

[10] Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

[11] Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446.

[12] North Missouri R. Co. v. Maguire, 49 Mo. 490, 8 Am. Rep. 141.

[13] State v. Conlon, 65 Conn. 478, 33 A. 519, 31 L.R.A. 55, 48 Am. St. Rep. 227.

[14] Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 S. Ct. 477.

[15] Neely v. Henkel, 180 U. S. 109, 45 L. ed. 448, 21 S. Ct. 302.

[16] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770.

[17] Herman v. Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

[18] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Herman v. Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672.

The Constitution of the United States was ordained by the people, and when duly ratified it became the Constitution of the people of the United States. Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[19] Ableman v. Booth, 21 How. (U. S.) 506, 16 L. ed. 169; Herman v. Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

which it created or rendered are possible of creation by its provisions.[20]

It has been said that the Federal Constitution was particularly intended to affect individuals rather than states,[1] but it operates alike on all the states[2] and the District of Columbia.[3] The extent of the operation of the Federal Constitution has often been explained by the Supreme Court, which has stated that the Constitution, in its operation, is coextenisve with the political jurisdiction of the United States[4] and that a clause in the Constitution must be given full force and effect throughout the Union.[5]

The question as to how the Federal Constitution operates with respect to the states involves other considerations. In the first place, its language is frequently imperative on the states as to the performance of duties.[6] In many ways it operates directly on the states in their corporate capacities, restraining and annulling their sovereignty in some of the highest branches of their prerogatives.[7] Thus, a state may not throw off its obligation and subjection to the Constitution and cannot withdraw at pleasure from the Union.[8] The Constitution only operates upon the states, however, in the manner set forth in the Constitution itself as a restriction on state activity, as distinguished from Federal. Limitations in the Federal Constitution in respect to the action of government upon the people do not apply to the state governments unless made so applicable in terms.[9]

In some senses the Federal Government is a union of the several states,[10] although in cases involving Federal questions a state cannot be regarded as standing alone.[11] The Federal Constitution, however, does not attempt to define the duties and obligations of the states or to prescribe the mode of their fulfilment.[12] Thus, it does not require a separate exercise by the states of their powers of regulation and of taxation.[13] Moreover, its spirit does not oppose but favors con-

[20] Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960.

[1] Hylton v. United States, 3 Dall. (U. S.) 171, 1 L. ed. 556.

[2] Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800.

[3] Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238, writ of certiorari denied in 254 U. S. 640, 65 L. ed. 452, 41 S. Ct. 13.

[4] The City of Panama v. Phelps, 101 U. S. 453, 25 L. ed. 1061.

[5] King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 S. Ct. 925.

[6] Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

[7] Ibid.

[8] Virginia v. West Virginia, 246 U. S. 565, 62 L. ed. 883, 38 S. Ct. 400; Bosworth v. Harp, 154 Ky. 559, 157 S. W. 1084, 45 L.R.A. (N.S.) 692, Ann. Cas. 1915C, 277.

[9] Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. ed. 672.

A "specification" in a bulletin of "instruction and information to dealers, and weights and measures officials," issued by a state superintendent of weights and measures, which states that "all combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations," cannot be said to be a law or regulation, such as comes within the scope of the several provisions of the Federal Constitution designed to secure the rights of citizens as against action by the states that is arbitrary, unreasonable, discriminatory, or that interferes with interstate commerce, where such official is not clothed with power to prescribe rules of action which city and county sealers are forced to follow or to prohibit the use in the state of scales not sealed in accordance with his regulations, since the function of such specification must be deemed to be educational, and at most advisory. Standard Computing Scale Co. v. Farrell, 249 U. S. 571, 63 L. ed. 780, 39 S. Ct. 380.

For restrictions placed upon the activities of the states by the provisions of the Federal Constitution as to impairment of the obligation of contracts, see Vol. 12, Subd. XII; as to various restrictions under the Fourteenth Amendment, see Vol. 12, Subd. XII, XIII, XIV; as to full faith and credit clause, see Vol. 12, Subd. XV.

As to the limitations which the Federal Constitution places upon state control or interference with interstate or foreign commerce, see COMMERCE, supra, p. 20, § 20.

[10] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579.

[11] Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558.

[12] League v. De Young, 11 How. (U. S.) 185, 13 L. ed. 657; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579.

[13] Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642.

gressional action which makes for the promotion of obedience to the laws of the several states.[14]

b. Other Basic Documents

§ 13. Declaration of Independence.—While statements of principles contained in the Declaration of Independence do not have the force of organic law and therefore cannot be made the basis of judicial decision as to the limits of rights and duties, yet it has been said that it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence,[15] and occasionally the courts refer to the Declaration in determining constitutional questions.[16]

§ 14. The Northwest Ordinance of 1787.—The Ordinance of 1787 passed by Congress for the government of the Northwest Territory has often been considered by the courts of the United States and of the several states. The Federal courts have announced that it was superseded by the adoption of the Constitution of the United States.[17] Accordingly, it has been held by the state courts that the Articles of Confederation conferred on the Confederate Congress power to enact the Northwest Ordinance in behalf of the United States, and that on the subsequent adoption of the Federal Constitution all the powers of the Confederate Congress passed to the Federal Congress, including the power to alter the compact.[18] The Ordinance is regarded as superseded by the Constitution on the ground that the Constitution places all the states of the Union on an equal basis, which would not be the case if the Ordinance continued to be in force after the adoption of the organic law.[19] Even after the adoption of the Constitution, however, some of the provisions of the Ordinance were continued in force by acts of Congress during the period of the territorial government of the Northwest Territory.[20]

It has similarly been held by the Supreme Court of the United States that an act of Congress extending to another territory the same rights, privileges, and advantages secured to the Northwest Territory by the Ordinance of 1787 has no more force after the adoption of the state Constitution than other acts of Congress organizing territorial governments.[1]

In both the Federal courts and those of the states created out of the Northwest Territory the doctrine that the Ordinance is superseded by the state

[14] State v. Missouri P. R. Co. 96 Kan. 609, 152 P. 777, Ann. Cas. 1917A, 612, affirmed in 248 U. S. 276, 63 L. ed. 239, 39 S. Ct. 93, 2 A.L.R. 1589.

[15] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268.

[16] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; American Federation of Labor v. Buck's Stove & Range Co. 33 App. (D. C.) 83, 32 L.R.A. (N.S.) 748, appeal dismissed in 219 U. S. 581, 55 L. ed. 345, 31 S. Ct. 472; People v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

[17] Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 S. Ct. 71; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. ed. 845, 6 S. Ct. 670; Strader v. Graham, 10 How. (U. S.) 82, 13 L. ed. 337.

[18] State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934.

Annotation: 52 L.R.A.(N.S.) 305; Ann. Cas. 1915D, 944.

[19] Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 S. Ct. 110; Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 S. Ct. 113; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 S. Ct. 313; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 S. Ct. 423; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185; Strader v. Graham, 10 How. (U. S.) 82, 13 L. ed. 337; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934.

Annotation: 52 L.R.A.(N.S.) 306 et seq.; Ann. Cas. 1915D, 946.

[20] Strader v. Graham, 10 How. (U. S.) 82, 13 L. ed. 337.

[1] Permoli v. New Orleans, 3 How. (U. S.) 589, 11 L. ed. 739.

Constitution upon the creation of a state is adhered to, and no effect is given to that Ordinance except so far as its principles may be embodied in the state Constitution.[2] Therefore, it has been held that when the various states created out of this Territory were admitted to the Union, their Constitutions superseded the Ordinance in matters dealing with slavery, navigable waters, apportionment into districts, legal proceedings, religion,[3] and compensation for particular services.[4]

2. Principles of Taxation and Local Self-government

§ 15. Taxation.—On occasions efforts have been made to dignify, as fundamental principles of constitutional law, certain maxims of governmental policy which have become familiar to all students of American history, and even when these are not actually incorporated in the Constitution of a state, they have been invoked as creating constitutional limitations on legislation. One of these is the maxim that there should be no taxation without representation. It does not appear that this principle has ever been judicially approved. Nevertheless, courts have deemed it of sufficient importance to warrant making the explanation that legislation is consistent with the principle embodied in the maxim, in that the representation of the people of each particular portion of a state in the legislature is adequate representation with respect to taxation measures affecting every part of the state.[5]

§ 16. Local Self-government.—It is a maxim of great practical importance in the American law that the people of a community are entitled to local self-government. There is a wide diversity of opinion on this question, and even in those jurisdictions which seem definitely committed to one view or the other, apparently inconsistent positions have been taken with respect to different factual situations to which the doctrine has been sought to be applied.[6]

In a majority of states the right of the people of a municipality to control its affairs is not considered as an inherent right residing in the people, but as dependent for its existence on legislative will.[7] Under this view, except as to pow-

[2] Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637 (Iowa); Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 S. Ct. 113 (Michigan); Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 S. Ct. 313 (Illinois); Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185 (Illinois); Strader v. Graham, 10 How. (U. S.) 82, 13 L. ed. 337; Permoli v. New Orleans, 3 How. (U. S.) 589, 11 L. ed. 739 (Louisiana); Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. ed. 565; Dixon v. People, 168 Ill. 179, 48 N. E. 108, 39 L.R.A. 116; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934 (wherein the court held that the Northwest Ordinance was superseded by the Constitution of Ohio when it was admitted into the Union, and said that the question was not presented in the earlier case of State v. Boone, 84 Ohio St. 346, 95 N. E. 924, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683, in which a contrary view was expressed).

Annotation: 52 L.R.A.(N.S.) 306 et seq.; Ann. Cas. 1915D, 945.

[3] Annotation: 52 L.R.A.(N.S.) 307 et seq.; Ann. Cas. 1915D, 947 et seq.

[4] State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934.

Annotation: 52 L.R.A.(N.S.) 313.

[5] Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330.

[6] As to a detailed discussion of the powers which may be exercised generally by municipalities as distinguished from the constitutional right of municipalities to exercise certain powers, see Municipal Corporations [Also 19 R. C. L. p. 728, §§ 35–74].

[7] Trent v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Re Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.(N.S.) 1092, 11 Ann. Cas. 911; People ex rel. Elder v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; State ex rel. Johnson v. Johns, 92 Fla. 187, 109 So. 228, citing R. C. L.; Kansas City v. J. I. Case Threshing Mach. Co. 337 Mo. 913, 87 S. W. (2d) 195, citing R. C. L.; Redell v. Moores, 65 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431, overruling State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L.R.A. 624; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

Annotation: 88 A.L.R. 228.

ers conferred by constitutional provisions, municipalities have no inherent right of self-government which is beyond the legislative control of the state.[8] In these jurisdictions an act of the legislature will not be declared invalid as abridging the privilege of local self-government.[9] Thus, on the theory that municipal corporations do not have, apart from express constitutional provisions, any inherent immunity from legislative control, even as to their purely local activities, statutes relating to municipal fire departments have been held valid against the contention that they interfere with the right of local self-government.[10] In other jurisdictions the right to local self-government is treated as inherent in cities and towns and, if not surrendered on the adoption of the state Constitution, cannot be taken away by the legislature.[11] In these states the principle of home rule, or the right of self-government as to local affairs, is deemed to have existed before the Constitution.[12] It has been said that the rights granted by Magna Charta relating to cities, boroughs, and towns were brought over by the colonists, and the liberties and customs of localities reappeared on a novel and wider basis in the town meetings of New England and the various colonies.[13]

The result of the doctrine is best illustrated by typical examples of its application. For example, on the theory that municipal corporations have, apart from express constitutional provisions, an inherent immunity from legislative control as to their purely local activities and that the voluntary maintenance and operation by a municipal corporation of a fire department are purely local functions, statutes relating to municipal fire departments have been held invalid as interfering with the right of local self-government.[14] The right of local self-government in the establishment or administration of parks has been recognized and upheld in a number of jurisdictions, particularly as against the imposition by the legislature of a pecuniary obligation on the municipality.[15] As to parks, however, there is quite a diversity of opinion, for many of the cases involving the establishment or administration of parks have recog-

[8] Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, 105 A.L.R. 244.

As to powers expressly conferred upon municipalities by "home rule" provisions of the state Constitutions, see infra, § 17.

[9] Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L.R.A. 142, 12 Am. St. Rep. 566.

[10] Annotation: 100 A.L.R. 1081.

No unconstitutional deprivation of local self-government is made by a statute creating a board of fire and police commissioners for cities of the metropolitan class and placing the power of appointment thereto in the governor, since the power to create municipal corporations, which is vested in the legislature, implies the power to impose upon them such limitations as the legislature may see fit. Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431, overruling State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L.R.A. 624.

[11] State v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L.R.A. 240; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A.(N.S.) 1078, Ann. Cas. 1912A, 1063; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408; Ex parte Lewis, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

Local government is the nursery of civil liberty. Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408.

[12] People v. State Tax Comrs. 174 N. Y. 417, 67 N. E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674.

It must be presumed that the framers of the Constitution had the existence of the principle of local self-government and its continuance in view. State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893.

[13] People v. State Tax Comrs. 174 N. Y. 417, 67 N. E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674.

[14] State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93; Davidson v. Hine, 151 Mich. 294, 115 N. W. 246, 15 L.R.A.(N.S.) 575, 123 Am. St. Rep. 267, 14 Ann. Cas. 352; State ex rel. Kern v. Arnold, 100 Mont. 340, 49 P. (2d) 976, 100 A.L.R. 1071.

Annotation: 100 A.L.R. 1078, 1079.

A statute fixing the salaries of officers and employees of municipal fire departments has been held void as violating the right of local self-government. Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361.

[15] State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A.(N.S.) 1078, Ann. Cas. 1912A, 1063.

Annotation: 88 A.L.R. 234.

nized a twofold character in municipal corporations—the one public or governmental, the other private or proprietary—and, while refusing to recognize the right of legislative interference with the latter character, have upheld it as to the former, in the absence of constitutional limitation upon the legislative power.[16]

Even where the principle is applied, it seems to be greatly limited in application. In some of the jurisdictions applying the doctrine, the principle is definitely restricted to matters of purely local concern. Consequently, the position is taken that there is no invasion of the right of local self-government by a statute providing for the appointment of police commissioners by state officers, since it is a matter connected with the constabulary of the state, rather than a strictly local matter.[17] The principle is also only applied where necessary to the preservation of the right of self-government and is not extended to deny state legislation over matters not interfering with such right. The power to fix rates for public utilities is not necessary to local self-government, and denial or interference with the exercise of such power by the legislature does not constitute an interference with local self-government.[18] Other definite limitations upon the application of the doctrine are recognized. For obvious reasons, it is held that the right of local self-government does not exist as to a matter over which the Constitution has given the lawmaking power supreme control[19] and that even under the power to exercise self-government or home rule, a city cannot act on matters purely of state concern.[20] A practical application of these limitations is seen in the holding that the principle of local self-government is not violated by a statute providing that the state board of tax commissioners may review municipal tax levies and affirm or decrease a levy or any item thereof, where the right of taxation is vested by the Constitution in the legislature, from which the authority of the municipality to tax is derived.[1]

§ 17. —Express Constitutional Provisions for Home Rule.—The right of home rule by cities has been established in a number of states by constitutional provision for the government of municipal corporations by charters—known as home-rule or freeholders' charters—framed by the municipality itself and adopted by popular vote of its own people. In some states such a charter becomes effective upon adoption by the people of the municipality, while in other states the Constitutions require that the charter, after being thus adopted, shall be sub-

[16] West Chicago Park v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L.R.A. 215; People ex rel. Bransom v. Walsh, 96 Ill. 232, 36 Am. Rep. 135; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314; Re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L.R.A. 417.

Annotation: 88 A.L.R. 229.

Neither the right of municipal self-government nor the fundamentals of the commission form of government are encroached upon by a statute making it mandatory for cities of a prescribed population to establish a park board, where such board has nothing to do with the raising of revenue, but is charged only with disbursement of the amount appropriated by the city as a park fund. State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 S. W. 390, 88 A.L.R. 218.

[17] State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L.R.A. 566.

[18] Logansport v. Public Serv. Commission, 202 Ind. 523, 177 N. E. 249, 76 A.L.R. 838.

[19] State ex rel. Clark v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L.R.A. 240.

An act of the legislature arbitrarily establishing a high school and requiring the people of the county to build and maintain it, without their consent, is not an unconstitutional interference with the right of local self-government. State ex rel. McCausland v. Freeman, 61 Kan. 90, 58 P. 959, 47 L.R.A. 67.

It is not an interference with the principles of local self-government vested in counties and townships for the state to provide for the construction of highways, and the legislature may therefore enact a law levying a tax for such purpose. State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934.

[20] Logansport v. Public Serv. Commission, 202 Ind. 523, 177 N. E. 249, 76 A.L.R. 838.

[1] Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186, 907, 70 A.L.R. 1232.

mitted to the legislature for approval or rejection. Once accepted, it cannot be altered by the legislature until another is adopted in the same manner.[2] In these jurisdictions a right to home rule, a local self-government, which it is substantially for practical purposes, is safeguarded by the provisions of the state Constitution[3] and the legislature cannot interfere therewith.[4] This doctrine is subject to limitation. A constitutional provision that the legislature shall not enact, amend, or repeal any municipal charter and granting to the local voters of every city and town the power to enact and amend a municipal charter does not operate to exempt a city having a home-rule charter from legislative enactments pertaining to the general welfare of the state.[5] The exception, however, applies to matters general in substance, not a law general in form. A general law, in order to prevail over conflicting charter provisions or ordinances of a city having a home-rule charter, must pertain to those things of general concern to the people of the state, and it cannot deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated.[6]

In some states the constitutional grant of home rule to municipalities is made subject to legislative enactments affecting the entire state. In the interpretation of the effect of such a constitutional limitation, it has been held that the constitutional limitation upon the power of home rule conferred upon municipalities, that it shall be subject to such enactments of the legislature of state-wide concern "as shall, with uniformity, affect every city or every village," contemplates legislation which may be operative only as to municipalities within a specified class, and not merely such statutes as shall affect every city from the smallest to the largest. Therefore, an act of the legislature dealing with local affairs and government must, if not to be subordinate to a charter ordinance, be one which affects with uniformity every city; and if, in dealing with the local affairs of a city, the legislature classifies cities so that the act does not apply with uniformity to every city, that act is subordinate to a charter ordinance relating to the same matter.[7] In construing a slightly different constitutional limitation upon the home-rule power, the Supreme Court has stated that a statute exempting from taxation the property of a railroad company the line of which connects a city of the state with its capital in another county is not repugnant to a home-rule provision of the state Constitution that no public local law shall be enacted for such city, but that any law so drawn as to apply to two or more of the geographical subdivisions of the state—the city being considered for this purpose a geographical subdivision—shall not be deemed a local law within such provision.[8]

These home-rule provisions in the state Constitutions not only differ greatly

[2] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 748, § 53].

[3] State ex rel. Bulkeley v. Williams, 68 Conn. 131, 35 A. 24, 421, 48 L.R.A. 465, affirmed in 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617; Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330; Ex parte Farnsworth, 61 Tex. Crim. Rep. 342, 135 S. W. 538, 33 L.R.A.(N.S.) 968.

Annotation: 1 L.R.A.(N.S.) 512.

"The right of local self-government is merely a recognition of express or implied constitutional restrictions upon legislative power. The right exists and extends so far, and so far only, as it is reserved by express or implied constitutional restrictions." State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

No express or implied constitutional guaranty of the right of local self-government is violated by a statute establishing a state bonding fund for the purpose of furnishing official bonds for county, city, village, school district, and township officers. Ibid.

[4] Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[5] Ibid.

[6] Ibid.

[7] Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, 105 A.L.R. 244.

[8] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431.

in detail but in effect and interpretation, creating many varied results when applied to specific situations. The conflict between state and municipal tax laws affords an excellent example of the diverse conclusions reached by the courts. Due in part to the difference in the governing constitutional provisions in the various states, the power of the legislature, through its designated authorities or otherwise, to supervise, review, and revise the tax budgets of home-rule charter cities has been recognized in some cases, while it has been denied in others.[9] One view is that a tax levy by a municipality, germane to the purposes for which it was incorporated and not in excess of the limitation fixed by the Constitution or by a general law, is a matter of local concern with which the legislature is forbidden, by the municipal home-rule provisions of the state Constitution, to meddle[10] and that a statute which subjects the budget of a city to the revision of a commission appointed by the governor, in so far as it purports to authorize the commission to eliminate or reduce items in a budget when the city submitting it has not gone beyond any constitutional or statutory limitation of indebtedness or taxation, deprives the people of such a city of the right of local self-government guaranteed by a constitutional provision for municipal home rule.[11] On the other hand, the home-rule provisions of the Ohio Constitution authorizing municipalities operating under home-rule charters to exercise all powers of self-government do not prevent the legislature from limiting the taxing power of home-rule cities and appointing administrative agencies to supervise, adjust, and levy taxes for such cities.[12] It has generally been held that legislatures have power with respect to the amount of tax which may be levied by home-rule charter cities for municipal purposes. Consequently, statutes authorizing a greater tax levy than the limitation contained in a home-rule charter have been sustained as a valid exercise of legislative power, while taxes in excess of the maximum authorized under statutory provisions, although in compliance with the terms of a city charter, have been held to be illegal.[13] Likewise, it has been stated that a statute levying an emergency income tax for the relief of unemployment and providing for the distribution of its proceeds directly to the cities, villages, and towns of the state on a per capita basis does not violate the home-rule provision of the state Constitution.[14] Home rule for municipalities does not in many jurisdictions prevent the legislature from changing or restricting the power of cities concerning the assessment, levy, and collection of taxes on the theory that the matters involved are of general public concern in which the state has an interest and which, therefore, are subject to control by the state by general laws. In other jurisdictions, however, provisions of the Constitution providing for home rule have been deemed to prohibit such regulation of city taxation by the state at large.[15] A general statute which provides for the transfer of tax funds of municipalities from one fund to another and restricts such transfers in certain particulars has been held not to violate home-rule provisions of a state Constitution. On the question as to whether the city has power under its freehold charter to levy a license tax for municipal purposes, free from interference from the state legislature, there is a split of authority. In some jurisdictions it has been held to be beyond the power of the legislature to abrogate

[9] Annotation: 106 A.L.R. 1203.

[10] Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[11] Ibid.

[12] Annotation: 106 A.L.R. 1203.

[13] Annotation: 106 A.L.R. 1204.

A municipal home-rule provision of a state Constitution does not preclude the legislature from limiting by general law the amount of local taxes which may be levied or the amount of municipal indebtedness. Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[14] Van Dyke's Appeal, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332.

[15] Annotation: 106 A.L.R. 1205.

or interfere with this power of the cities. Other courts have sanctioned general laws in conflict with such municipal regulations.[16] The legislature has been held to have the power to regulate by general law school taxes even though there is a home-rule provision allowing a city to provide for school taxes. In the same manner, a state legislature has been allowed to delegate to a home-rule city the power to levy taxes for library purposes, thus allowing the city to adopt the state law in spite of a provision in the state Constitution prohibiting the imposition of taxes on municipal corporations for municipal purposes by the legislature and further providing that taxes for municipal purposes be imposed by respective municipalities under authority granted them by their home-rule charters.[17]

Some diversity because of the wording of the provisions of the state Constitutions has arisen in construing state-wide public property insurance statutes. One court has held that a statute which establishes a state fire and tornado fund for the purpose of furnishing fire and tornado insurance upon the property of the state, counties, cities, or other political subdivisions does not violate any express or implied constitutional guaranty of the right of local self-government.[18] Another court has determined that a statute which makes it compulsory upon cities and towns to insure their public buildings and property in a state insurance fund is unconstitutional as violating the home-rule provisions of the state Constitution, although valid as to other political subdivisions.[19]

Laws relating to political matters have generally been upheld, as against the contention that they violate home-rule provisions of the state Constitution. Although a few early decisions indicated a contrary conclusion, it is well established by the recent authorities that the establishment of a commission form of municipal government is not an interference with a constitutional guaranty of local self-government.[20] Statutes which authorize the extension of municipal boundaries for the annexation to a city of adjacent territory have generally been held not to interfere with the constitutional right of local self-government. It seems, however, that if one home-rule city attempts to annex another city of the same dignity, a statute which permits such annexation violates a home-rule amendment of the Constitution as to the city so sought to be forcibly annexed to another municipality.[1]

There is also a conflict of authority concerning the fire and police department statutes. Statutes relating to municipal fire departments have been held inapplicable to municipalities operating under home-rule charters.[2] The opposite conclusion has been reached elsewhere where the state Constitution also provides that the legislature may provide general laws relating to affairs of cities, which shall be paramount while in force to the provisions relating to the same matters included in the local charter provisions.[3] Where there is a constitutional limitation on the legislative power to tax for municipal purposes, laws requiring cities to levy taxes for fire department purposes have been held invalid in some jurisdictions as a violation of the provision referring taxation to local government,[4] while in others, such statutes have been sustained as valid on the theory that the operation of a fire department is not a corporate purpose within the

16 Annotation: 106 A.L.R. 1206.

17 Annotation: 106 A.L.R. 1206, 1207.

18 Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337.
Annotation: 100 A.L.R. 601.

19 State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581.
Annotation: 100 A.L.R. 600, 601.

20 Annotation: 67 A.L.R. 748.

1 Annotation: 64 A.L.R. 1366, 1367.

2 Annotation: 100 A.L.R. 1084.

3 Annotation: 100 A.L.R. 1085.

4 Annotation: 100 A.L.R. 1084.

meaning of the constitutional provision that the legislature shall not impose taxes upon municipal corporations for corporate purposes.[5] In some states it has been held that the Constitution does not contemplate that a freeholders' charter of a city should vest powers in officers of the city's police department inconsistent with the general laws of the state creating such system.[6] Thus, salaries to be paid to members of the police department of a municipality operating under a home-rule or freeholders' charter have been held in the majority of cases to be matters of state-wide concern, and so not within the exclusive control of such a municipality.[7] On the other hand, under a section of a constitutional amendment providing that municipal home-rule charters framed or adopted by authority of the Constitution should be subject to, and controlled by, general laws, except in municipal affairs, a statute affecting the salaries of officers of municipal police departments and fire departments has been held not to apply to a municipal corporation governed by a charter adopted under such a constitutional amendment, the court finding that the pay of firemen and policemen clearly falls within the term "municipal affairs."[8] The matter of pensions, as respects members, or their widows, of the police department of a municipality operating under a home-rule or freeholders' charter, has generally been held to be within the exclusive control of such a municipality.[9] The courts of the various jurisdictions where home-rule or freeholders' charters are permitted by the Constitution are not in agreement as to whether a municipality operating under such a charter has exclusive control of the personnel of its police department in regard to dismissal, retirement, or other removal. Some courts have held that the city charter supersedes state legislation on this subject.[10] Other courts have stated that state legislation is not displaced by municipal charters.[11]

3. State Constitutions as Limits on Powers

§ 18. Generally.—A doctrine firmly settled in the law is that a state Constitution is in no manner a grant of power. It operates solely as a limitation of power.[12] All power which is not limited by the Constitution inheres

5 State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N. W. 196, 34 L.R.A.(N.S.) 607, Ann. Cas. 1912C, 542.
Annotation: 100 A.L.R. 1084.

6 Annotation: 105 A.L.R. 260.

7 State ex rel. Reynolds v. Jost, 265 Mo. 51, 175 S. W. 591, Ann. Cas. 1917D, 1102; Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, 105 A.L.R. 244.
Annotation: 105 A.L.R. 261.
Legislation regulatory of police and fire departments in cities of certain classes, in conditioning the power of a city council to decrease salaries of members of such departments upon the making of a recommendation by the board of police and fire commissioners, deals with a matter of state-wide concern within a constitutional provision conferring upon cities exclusive power to determine their local affairs and government subject to such enactments of the legislature of state-wide concern as shall, with uniformity, affect every city or every village. Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, 105 A.L.R. 244.

8 Annotation: 105 A.L.R. 263.

9 Annotation: 105 A.L.R. 263.

10 Annotation: 105 A.L.R. 264.

11 Annotation: 105 A.L.R. 264, 265.
In State ex rel. Burns v. Linn, 49 Okla. 526, 153 P. 826, Ann. Cas. 1918B, 139, it was held that the provisions in the home-rule charter of a city for the removal of its chief of police were not exclusive, but that such authority was cumulative to, and concurrent with, the jurisdiction vested in the District Court by the general laws of the state.

12 Birmingham v. Klein, 89 Ala. 461, 7 So. 386, 8 L.R.A. 369; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Independent School Dist. v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; State v. Dolan, 13 Idaho, 693, 92 P. 995, 14 L.R.A. (N.S.) 1259; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; State ex rel. Fletcher v. District Ct. 213 Iowa, 822, 238 N. W. 290, 80 A.L.R. 339; Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077; Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989; Bayville Village Corp. v. Boothbay Harbor, 110 Me. 46, 85 A. 300, Ann. Cas.

in the people,[13] and an act of a state legislature is legal when the Constitution contains no prohibition against it.[14] Provisions of a state Constitution prescribing the conditions under which debts may be incurred by the state and restricting the amount thereof are limitations and not grants of power, the power of the legislature in the matter of incurring indebtedness being plenary except as limited by the Constitution.[15] The rights of the people, however, are safeguarded by the state Constitutions as well as by the Federal Constitution. One court has stated that the Constitution is the measure of the rights delegated by the people to their governmental agents, and not of the rights of the people.[16] Constitutions measure powers of rulers, but they do not measure the rights of the governed.[17] One court which apparently regards the provision of the Constitution pertaining to legislative power as a grant has commented that the provision of the state Constitution granting legislative power and that reserving individual rights are to be considered together as interdependent, the one qualifying and limiting the other; and neither is supreme in a sense that would deprive the other of its effectiveness.[18]

III. ADOPTION AND AMENDMENT OF CONSTITUTIONS

A. Adoption

§ 19. United States Constitution.—The history of the events leading up to the adoption of the Constitution, together with some of the reasons underlying the selection of this form of controlling organic Federal law, has been well expressed by the Supreme Court.

The Revolution, or rather the Declaration of Independence, found the people already united for general purposes and at the same time provided for their more domestic concerns by state conventions and other temporary arrangements. From the Crown of Great Britain, the sovereignty of their country passed to the people of it, and it was not then an uncommon opinion that the unappropriated lands which had belonged to the Crown passed, not to the people of the colony or state within the limits of which they were situated, but to the whole people. On whatever principles this rested, it did not give way to the contrary opinion, and thirteen sovereignties were considered as having emerged from the principles of the Revolution, combined with local convenience and considerations. The people, nevertheless, continued to consider themselves, in a national point of view, as one people, and they continued without interruption to manage their

1914B, 1135; State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A. (N.S.) 111; Todd v. Reynolds (Mo.) 199 S. W. 173; State ex rel. Tillman v. District Ct. 101 Mont. 176, 53 P. (2d) 107, 103 A.L.R. 376; State ex rel. Toi v. French, 17 Mont. 54, 41 P. 1078, 30 L.R.A. 415; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838; Com. ex rel. McCormick v. Reeder, 171 Pa. 505, 33 A. 67, 33 L.R.A. 141; McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E, 858, Ann. Cas. 1917A, 1046; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; State v. Ide, 35 Wash. 576, 77 P. 961, 67 L.R.A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634; Fleetwood v. Read, 21 Wash. 547, 58 P. 665, 47 L.R.A. 205; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

As to powers of legislature, see infra, § 193.

As to authority of legislature, see infra, § 191.

As to the reserved powers of the states, see infra, §§ 170, 171.

13 Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

14 Independent School Dist. v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820.

15 State ex rel. Capitol Addition Bldg. Commission v. Connelly, 39 N. M. 312, 46 P. (2d) 1097, 100 A.L.R. 878.

16 Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408.

17 Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

18 Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

national concerns accordingly. Afterwards, in the hurry of the war and in the warmth of mutual confidence, they made a confederation of the states the basis of a general government. Experience disappointed the expectations they had formed from it, and then the people, in their collective capacity, established the present Constitution.[19]

When the Federal Convention met in 1787 to form the present Constitution of the United States, several drafts of such an instrument were presented for the consideration of the Convention. A draft which had been submitted on May 29, 1787, was, together with numerous suggestions and amendments, submitted to the committee on August 7th. On September 12th, a committee on revision reported a draft of the Constitution as revised and arranged. This draft in a great many respects was in the terms of the Constitution as it was subsequently adopted.[20] Hence, in September, 1787, after completing the great work in which they had been engaged, the Constitutional Convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to conventions of the several states, to be convened by their respective legislatures, and expressed the opinion that as soon as it should be ratified by the conventions of nine states, Congress should fix a day on which electors should be appointed by the states, a day on which the electors should assemble to vote for President and Vice President, "and the time and place for commencing proceedings under this Constitution."[1] The conventions of nine states having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Constitutional Convention and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, "for commencing proceedings under the Constitution."[2]

The Constitution of the United States went into effect March 3, 1789.[2a]

It is within the power of the people who made the Federal Constitution t unmake it. It is the creature of their own will and exists only by their will.[3]

§ 20. State Constitutions.—The various states in the United States have from time to time adopted state Constitutions which declare and guarantee the rights and liberties of the individual.[4] Governmental authority is divided in the state Constitutions into the three divisions of executive, legislative, and judicial authority. The agencies or departments so created are the agents of the people. They are, in general, separate and distinct departments or agencies independent of each other except to the extent that the action of one is made to

19 Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

"Experience made the fact known to the people of the United States that they required a National Government for national purposes. The separate governments of the separate states, bound together by the Articles of Confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the Confederated States. For this reason, the people of the United States, 'in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty' to themselves and their posterity (Const. Preamble), ordained and established the Government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action." United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

20 Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 S. Ct. 331.

1 Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124.

2 Ibid.

2a Ibid.

3 Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

4 Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

constitute a restraint upon others to keep the others within proper bounds and prevent hasty and improvident action.[5]

Whether a proposed new Constitution has been legally adopted by a state is an inquiry belonging to the political, not to the judicial, power.[6]

B. Amendment

1. United States Constitution

§ 21. Generally.—The framers of the Federal Constitution realized that it might, in the progress of time and the development of new conditions, require changes, and they intended to provide an orderly manner in which these could be accomplished. Thus, they adopted the Fifth Article[7] which makes provision for the proposal of amendments either by two thirds of both Houses of Congress or on application of the legislatures of two thirds of the states, thereby securing deliberation and consideration before any change can be proposed.[8]

The choice between submission of a proposed amendment to the Federal Constitution to state legislatures and submission to state conventions lies in the sole discretion of Congress, irrespective of whether the amendment is one dealing with the machinery of government or with matters affecting the liberty of the citizen.[9] The provisions of the Tenth Amendment to the Federal Constitution that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" do not limit the power vested by the Fifth Article of the Constitution in Congress as the delegated agent of the people in the choice of modes of ratification of a proposed constitutional amendment affecting the personal liberty of the citizen.[10] Weight is given to the established practice as to the method of submission of amendments.[11]

Questions as to the method of voting on a proposal for an amendment by Congress seem well settled by the decisions of the Supreme Court. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal is deemed necessary by all who vote for it. An express declaration that they regard it as necessary is not essential.[12] The two-thirds vote in each House of Congress, which is required in proposing an amendment to the Constitution, is a vote of two thirds of the members present—assuming the presence of a quorum—and not a two-thirds vote of the entire membership, present and absent.[13]

Congress in proposing an amendment to the Federal Constitution is not acting strictly in the exercise of ordinary legislative power.[14] A congressional resolution proposing an amendment does not require the approval of the President.[15]

It seems settled that the proposal of an amendment may be accompanied by a stipulation concerning the time within which it must be ratified to be validly adopted. Congress, in proposing an amendment to the Federal Constitution, may, keeping within reasonable limits, fix a definite period for ratification by the states, and could therefore validly declare, in the resolution proposing the Eighteenth Amendment, that it should be inoperative unless ratified within seven years.[16] In the absence of such a provision the Supreme Court has stated that the fair inference or implication from the Fifth Article is that the ratification must be within some reasonable time after the proposal.[17]

There is a dearth of authority relating to the validity of action taken by the states preliminary to any congressional action in regard to the proposal of an amendment to the Federal Constitution.[18] One state court has, however, taken the position that submission to the electors of a state of the question whether a provision of the Federal Constitution shall be repealed is not beyond the powers of the state legislature as involving a disregard of the provisions of Article 5 of the Federal Constitution as to the mode in which amendments may be proposed and adopted.[19] The court proceeds on the theory that an elector's expression of opinion on such a question is an exercise of the right to petition guaranteed by the Constitutions, state and Federal.[20]

With regard to ratification of proposed amendments to the Federal Constitution, many interesting questions have arisen. The Fifth Article provides clearly that the Constitution of the United States may be altered only by constitutional amendments duly submitted to, and ratified by, three fourths of the states,[1] but the method to be selected for ratification has been subjected to experimentation. The article itself also provides two methods of ratification—namely, by the legislatures of three fourths of the several states or by constitutional conventions in three fourths of the states.[2] Both of these methods

[5] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[6] Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581.

[7] Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[8] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

Annotation: 83 A.L.R. 1374, s. 87 A.L.R. 1321.

In the matter of the amendment of the Federal Constitution the people divested themselves of all the authority and conferred the power of proposal upon Congress or upon a national convention, called upon application of the legislatures of two thirds of the states, and the power of ratification upon the state legislatures or upon state constitutional conventions. Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

[9] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401.

[10] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381.

[11] Ibid.

[12] National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588.

[13] Ibid.

[14] Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

[15] Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. ed. 644; State v. American Sugar Ref. Co. 137 La. 407, 68 So. 742, citing R. C. L.; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; Warfield v. Vandiver, 101 Md. 78, 60 A. 538, 4 Ann. Cas. 692; State v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 563.

Annotation: 83 A.L.R. 1374, s. 87 A.L.R. 1321; 4 Ann. Cas. 703.

[16] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510.

Annotation: 83 A.L.R. 1377, s. 87 A.L.R. 1321.

[17] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510.

[18] Annotation: 83 A.L.R. 1379, s. 87 A.L.R. 1321.

[19] Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

[20] Ibid.

[1] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494.

The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment to the Federal Constitution, was within the power to amend reserved by Article 5 of such Constitution. National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588.

[2] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588; Hawke v. Smith, 253 U. S. 231, 64 L. ed. 877, 40 S. Ct. 498 (Nineteenth Amendment); Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504 (Eighteenth Amendment); Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102;

of ratification call for action by deliberate assemblages representative of the people, which action, it was assumed, would voice the will of the people.[3] The courts, in the consideration of questions concerning ratification by the states, have acknowledged the fundamental principle that ratification of a proposed amendment to the Constitution of the United States is wholly governed by the provisions of that Constitution.[4] It is not the function of courts or legislative bodies, national or state, to alter the method for the ratification of amendments to the Federal Constitution, which the Constitution itself has fixed.[5] The power to enact the laws of a state is derived from the people of the state; but the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution, to which the state and its people have assented.[6] Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word; it is only the expression of the assent of the state to a proposed amendment.[7] Accordingly, a state legislature in ratifying a proposed amendment to the Federal Constitution is not acting strictly in the discharge of legislative duties,[8] but its function in ratifying a proposed amendment is a Federal one[9] and transcends any limitations sought to be imposed by the people of the states in the Constitutions of those states.[10] Therefore, referendum provisions of state Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of the 5th Article that ratification shall be by the legislatures of the several states or by conventions therein as Congress shall decide.[11]

Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.
Annotation: 83 A.L.R. 1375, s. 87 A.L.R. 1321.

The Eighteenth Amendment to the Federal Constitution which prohibited the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes was not void because ratified by the legislatures of the required number of states instead of by conventions. United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381.
Annotation: 83 A.L.R. 1378, s. 87 A.L.R. 1321.

[3] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[4] Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.

[5] Hawke v. Smith, 253 U. S. 231, 64 L. ed. 877, 40 S. Ct. 498; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[6] Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[7] Hawke v. Smith, 253 U. S. 231, 64 L. ed. 877, 40 S. Ct. 498; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504.

[8] Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1512; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.

[9] Leser v. Garnett, 258 U. S. 130, 66 L. ed. 505, 42 S. Ct. 217; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.

When a state legislature performs any act looking to the ratification or rejection of an amendment to the Federal Constitution, it is not acting in accordance with any power given to it by the state Constitution, but is exercising a power conferred upon it by the Federal Constitution. State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.

[10] Leser v. Garnett, 258 U. S. 130, 66 L. ed. 505, 42 S. Ct. 217.

[11] National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588; Hawke v. Smith, 253 U. S. 231, 64 L. ed. 877, 40 S. Ct. 498; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.
Annotation: 5 A.L.R. 1417; 10 A.L.R. 1510; 83 A.L.R. 1376, s. 87 A.L.R. 1321, 1322.

The people of a state cannot resume by a referendum amendment to their state Constitution any power over the ratification of proposed amendments to the Federal Constitution which they have placed in the legislature or a ratifying convention. Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

A legislative resolution ratifying a proposed amendment to the Federal Constitution submitted by joint resolution of Congress to the states for ratification is not within a provision of the state Constitution requiring submission to the vote of the people of every bill or resolution having the force of law. Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

Ratification is valid once the amendment is duly adopted by three fourths of the states. For example, it was held that there was nothing in the character of the proposed Nineteenth Amendment to the Federal Constitution, extending suffrage to women, which prevented its adoption in the exercise of the power of amendment conferred by the Constitution, even as against a state which refused to ratify it.[12] If a state legislature has once ratified a Federal Amendment, a subsequent legislature has no power to rescind the ratification.[13]

The proceedings are concluded by due notice followed by proclamation that the proposed amendment has been ratified. Duly authenticated official notice to the Secretary of State that certain state legislatures, having power to adopt a resolution ratifying a proposed amendment to the Federal Constitution, have done so is conclusive upon him and, when certified to by his proclamation, is conclusive upon the courts.[14]

Since the method of ratification by conventions in the states, rather than by state legislatures, has now been employed[15] and will probably be employed in the future, new problems have arisen concerning the proper procedure for ratification. Since the calling of a convention to ratify an amendment to the Federal Constitution is a Federal function and the authority of the state legislature to set up the machinery by which a convention may ratify or reject an amendment emanates from the Federal Constitution, when Congress directs action by convention, it necessarily implies the authority to provide for the assembly of such conventions. Consequently, when the state legislature provides the method for such a convention, it is not making laws and its action is not subject to state referendum.[16] Some of the state courts have, however, taken the position that an act calling a convention to pass upon an amendment to the United States Constitution is subject to referendum by the voters of the states as provided by their state Constitutions.[17]

The so-called Child Labor Amendment to the Federal Constitution, which was proposed by a vote of two thirds of each House of Congress in 1924 and has ever since been before the legislatures of the states for ratification or rejection, has given rise recently to some interesting controversial questions.[18] The state courts which have dealt with the validity of recently attempted ratification of this proposed amendment by their respective legisla-

[12] Leser v. Garnett, 258 U. S. 130, 66 L. ed. 505, 42 S. Ct. 217.

[13] Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

[14] Leser v. Garnett, 258 U. S. 130, 66 L. ed. 505, 42 S. Ct. 217.
Annotation: 83 A.L.R. 1377, s. 87 A.L.R. 1321.

[15] This method was used for the first time in the ratification of the Twenty-first Amendment.

[16] State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.
Annotation: 87 A.L.R. 1323, 1324.

The direction of Congress that the ratification of a constitutional amendment proposed by it shall be by state conventions confers by implication authority on state legislatures to provide for the assembling of such conventions. Provision by a state legislature for a convention to pass upon a proposed amendment to the Federal Constitution is not a legislative act and is, therefore, not within the provisions of the state Constitution for a referendum of any act of the legislative assembly. State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 586, 54 S. Ct. 102.

[17] Annotation: 87 A.L.R. 1321, 1322, 1323.

Closely allied to the conclusion reached by these authorities cited in the text statement is the theory of some state courts that a proposed convention for the ratification or rejection of an amendment to the Federal Constitution must come into being pursuant to state law which must be duly enacted pursuant to the state Constitution.
Annotation: 87 A.L.R. 1321, 1322.

[18] Annotation: — A.L.R. —.

tures are in complete disaccord.[19] The matters involved will be definitely determined only by a decision of the Supreme Court of the United States.[20] In two of the states in which the state legislatures acted to ratify the proposal in 1937 questions were raised as to the effect of previous rejection of the proposed amendment by such states.[1] One of the courts took the position that a state legislature which has rejected an amendment proposed by Congress may later reconsider its action and give its approval[2] and, as a corollary to this theory, that a ratification once given cannot be withdrawn.[3] In the other state in which the question was considered, however, the court reached an exactly opposite conclusion, stating that in its opinion a state can act but once upon a proposed amendment; and whether its vote is in the affirmative or negative, if it has once acted, it has exhausted its power further to consider the question without a resubmission by Congress.[4] The court of the latter state also took the position that a rejection by more than one fourth of the states at one time or another probably terminated the "offer" of the amendment by Congress.[5] In these cases involving attempted ratification of the Child Labor Amendment the question was also raised as to whether a reasonable or unreasonable time had elapsed before the current state action, and consequently, whether the state legislature would have the power still to act upon the proposal. One of the courts took the position that the proposal is still subject to ratification and that a reasonable time has not elapsed because the proposal has relation to the sentiment and felt needs of the day.[6] The other court, however, held that the reasonable time during which the "offer" remained open had expired. It stated that inasmuch as only one state acted upon the proposal between 1927 and 1933, it is indicated that general sentiment considers the proposal to be no longer before the people and that the offer necessarily expired at some time during the period of apparent abandonment between the end of 1927 and the revival of interest in 1933—that by any yardstick more than a reasonable time had elapsed by January, 1937.[7]

2. State Constitutions

a. In General

§ 22. Generally.—Many of the Constitutions, made and ordained in the early days of written Constitutions in our country, were silent on the question of future changes. The policy of regulating by express constitutional provisions the exercise of so important a power soon began to be generally apparent. In several of the states the clauses of the Constitutions relating to amendments have been couched in negative terms, interdicting amendments except in the cases and modes prescribed. In a majority of the cases, however, they have been permissive, pointing out modes in which conventions may be called or specific amendments effected without terms of restriction or allusion to other possible modes. It is settled that amendments to our Constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of law.[8]

19 Annotation: — A.L.R. —.

20 Annotation: — A.L.R. —.

1 Annotation: — A.L.R. —.

2 Coleman v. Miller, 146 Kan. 390, 71 P. (2d) 518, — A.L.R. —.
Annotation: — A.L.R. —.

3 Coleman v. Miller, 146 Kan. 390, 71 P. (2d) 518, — A.L.R. —.
Annotation: — A.L.R. —.

4 Annotation: — A.L.R. —.

5 Annotation: — A.L.R. —.

6 Coleman v. Miller, 146 Kan. 390, 71 P. (2d) 518, — A.L.R. —.

7 Annotation: — A.L.R. —.

8 Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

9 Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610.
The term "amendment" referring to the state Constitution implies such an addition or change within the lines of the original instrument as will effect an improvement or better carrying out of the purpose for which it was framed. Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.

10 Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; State v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; State v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; Simpson v. Hill, 128 Okla. 269, 263 P. 605, 56 A.L.R. 706; McAlister v. State, 95 Okla. 200, 219 P. 134, 33 A.L.R. 1370.

Under our institutions sovereignty resides in or with the people and may be exercised in the manner they have provided by the Constitution.[9] The power to change a state Constitution is generally exercised in either one of two methods—namely, by a convention of delegates chosen by the people for the express purpose of revising the entire instrument or through the adoption by the people of propositions for specific amendments that have been previously submitted to it by the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred on the legislature in reference to proposing amendments, as well as to calling a convention, must be strictly pursued.[10]

Any attempt to revise a Constitution or adopt a new one in any manner other than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary.[1] Where, however, a Constitution is silent as to the manner of submitting a proposed amendment to the electors, it has been held that the method is subject to legislative control.[2]

In some states constitutional amendments may be proposed by proceedings under the initiative and referendum, and the requirements governing the passage of statutes by the initiative and referendum are followed in making changes in the state Constitution.[3] In other jurisdictions, however, it has been held that the state Constitutions cannot be amended by initiative and referendum on the theory that the already existing constitutional provisions as to amendment govern so far as they are applicable. In other words the diversity of holding on this question arises in the determination of what constitutional provisions or restrictions are applicable to future amendments. If the amendment which in and of itself provides for future amendment by means of the initiative and referendum indicates an intention to repeal the existing constitutional provision as to amendment, it controls and is immediately a valid method of amendment in the future.[4]

Constitutional amendments will not be declared to have been invalidly adopted unless there is no reasonable doubt in the matter.[5]

§ 23. Scope of Alterations.—Since constitutional provisions derive their force from the people themselves, not from the legislature, and under the American theory of government all power is inherent in the people,[6] including

1 Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.
See infra, § 25.

2 People v. Loomis, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751.

3 State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.
Annotation: 50 L.R.A.(N.S.) 205, s. L.R.A. 1917B, 23.
As to inapplicability to amendment of United States Constitution, see supra, § 21.

4 Annotation: 50 L.R.A.(N.S.) 205, s. L.R.A.1917B, 23.

5 State ex rel. Hay v. Anderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39.

6 Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Ex parte Farnsworth, 61 Tex. Crim. Rep. 342, 135 S. W. 538, 33 L.R.A.(N.S.) 968.

the right to make changes in the organic instrument of government,[7] there are practically no limits except those contained in the Federal Constitution as to the changes which may be made in the Constitution of a state, where such alterations are made in the prescribed manner.[8] A constitutional provision that any amendment may be proposed in either branch of the legislative assembly and referred to the people for approval or rejection permits the proposal of amendments withdrawing privileges conferred upon the people by the State Bill of Rights.[9] Thus, the power to amend the Constitution includes the power to repeal a previous amendment incorporating in the State Bill of Rights a provision forbidding the death penalty for crime.[10] A constitutional provision or amendment may be repealed, by a provision adopted under the power to amend, by constructive repeal, or by implication through the adoption of an inconsistent provision.[11] One limitation, however, is that the republican form of government cannot be dispensed with or abolished.[12]

In the bills of rights of some of the states the principle is expressly affirmed that the people have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper.[13]

If a state Constitution provides that the general assembly may, at any time, propose such amendments to that instrument as a majority of the members elected to each house deem expedient, the substance and extent of amendments are left entirely to the discretion of the general assembly.[14]

In spite of the general acceptance of the rule as to the unlimited power of the people in making changes in the fundamental law, a distinction between legislative acts and constitutional provisions has been drawn in certain jurisdic-

To erect the state or to institute the form of its government is a function inherent in the sovereign people. To carry out its purpose of protecting and enforcing the rights and liberties of which the ordained Constitution is a guaranty, by enacting rules of civil conduct relating to the details and particulars of the government instituted, is the function of the legislature under the general grant of authority. It needed no reservation in the organic law to preserve to the people their inherent power to change their government against such a general grant of legislative authority. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[7] Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287; Holden v. Hardy, 169 U. S. 366, 42 L. ed 780, 18 S. Ct. 383; Crawford v. Gilchist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.

"The people are above the Constitution, subject to it and all its parts while it is in force, but possessed of the undoubted right to change, alter, or amend it at their own will in any of the regular ways provided by Constitution or laws." Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

Power over the Constitution and its change has ever been considered to remain with the people alone, except as they had, in their Constitution, especially delegated powers and duties to the legislative body relative thereto for the aid of the people only. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[8] Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815.

[9] Ex parte Kerby, 103 Or. 612, 205 P. 279, 36 A.L.R. 1451.
Annotation: 36 A.L.R. 1456.

[10] Ex parte Kerby, 103 Or. 612, 205 P. 279, 36 A.L.R. 1451.

[11] Annotation: 36 A.L.R. 1456.

[12] Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.
As to the effect of the Federal guaranty of a republican form of state government, see infra, §§ 46–48.

[13] Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; State v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

[14] Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815.
Compare Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312, holding that such power is to be strictly construed and that it is much more limited in its extent than that of a constitutional convention.
The question is one of power to draft organic law. The legislature has only that measure of such power expressly granted to it by the people speaking through the Constitution, and that is to be exercised strictly in the mode provided. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

tions where changes in the Constitution and in the statutory law may be made by initiative and referendum; and the rule has been announced that matters properly belonging to statutory law cannot properly be inserted in the state Constitution.[15]

§ 24. —Changes in Particular Matters.—Every part of a state Constitution may be amended, including the provisions authorizing the making of amendments,[16] and new articles may be added.[17] Of course, the amendment of a state Constitution might operate to impair the obligation of a contract created by the provision amended and thus violate one of the restrictive provisions of the Federal Constitution; but a provision establishing the seat of government at a certain city is not in this category as creating vested rights in the owners of real estate in such city. The right of the people to establish and remove their seat of government at pleasure involves a governmental subject, about which there can be no irrepealable law or organic provision.[18]

Since the power to make changes is one to be exercised only in the established manner, the question may arise as to whether alterations in the fundamental law may be made to take effect upon the happening of future events. On this point it has been held that a constitutional amendment consolidating a city and county government and authorizing the people to make and thereafter amend a charter for their government is not invalid on the ground that it is dependent upon future contingencies.[19] On the other hand it has been held that an amendment to a state Constitution changing the seat of government to another city on condition of a certain donation of land and money and an approval by certain officers of the site donated was not such an amendment that the legislature could authorize its submission to the vote of the people, since it would not, upon adoption by the people, become an effective part of the Constitution without subsequent acts and discretionary approval by certain officers and commissioners.[20]

§ 25. —Revolutionary Changes.—It is universally conceded that the people are sovereign and that they have power to adopt a Constitution and to change their own work at pleasure. The people must act by majorities, however, and in adopting a Constitution the majority which does so has in effect prescribed the method by which the majority of the people may alter or amend it. An attempt by the majority to change the fundamental law in violation of the self-imposed restrictions is unconstitutional and revolutionary.[1] If essential

[15] State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639.
The principle of the initiative and referendum may be inserted in a state Constitution. State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

[16] Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

[17] People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

[18] Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815.

[19] People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

[20] Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.

[1] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; State v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706; State v. Boloff, 138 Or. 568, 7 P. (2d) 775, citing R. C. L.
"The Constitution is the fundamental law of the state. It received its force from the express will of the people, and in expressing that will the people have incorporated therein the method and manner by which the same can be amended and changed, and when the electors of the state have incorporated into the fundamental law the particular manner in which the same may be altered or changed, then any course which disregards that express will is a direct violation of that fundamental law." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dis-

mandatory provisions of the organic law are ignored in amending a Constitution, it violates the right of all the people of the state to government regulated by law.[2]

Although the vote of the people should be overwhelming in adopting a Constitution formulated by a convention not legally called, it would be the duty of the executive and judiciary and all officers sworn to support the old Constitution to resist to the utmost the installation of government under the new revolutionary Constitution. If overpowered, the new government would be established, not by peaceful means, but by actual revolution. The unauthorized action of a convention cannot be ratified by the electorate, since those voting at an unauthorized election have no power to represent or to bind those who do not choose to vote. A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.[3] It has similarly been held that the enactment of an initiative statute cannot operate as a constitutional amendment.[4] For example, an initiative petition calling an extraordinary session of the legislature, the purpose of which act is stated to be to complete vitalization of a constitutional provision dealing with impeachment and removal from office and to render it effective, cannot be construed as a constitutional amendment giving the legislature the right to assemble for impeachment purposes without call by the governor, pursuant to the Constitution, even though the initiative petition is considered as having been legally adopted as an initiative measure.[5]

b. Method of Amendment of State Constitutions

§ 26. Call of Constitutional Conventions.—The customary manner of calling constitutional conventions in the United States is by resolution of the legislature followed by a submission of the question to the electorate.[6] At one time

missed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

"The people of a state may form an original Constitution, or abrogate an old one and form a new one, at any time, without any political restriction except the Constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a Constitution already in existence, they can do it only by the method pointed out by the Constitution to which the amendment is to be added. The power to amend a Constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject, contrary to its prohibitions." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[2] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

[3] Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890; State v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

In some instances Constitutions have been promulgated by proceedings which might be deemed revolutionary in character. At the time of Dorr's Rebellion in Rhode Island, there were two opposing governments, one under the colonial charter and the other organized under a Constitution adopted by a self-constituted convention. The Supreme Court of the United States in this instance avoided deciding whether recognition could in any case be given to a government organized by methods not sanctioned by the existing charter, but resorted to the doctrine that the political department represented by Congress, rather than the judiciary, is intrusted with the power of determining which is the true government of a state and that the courts would abide by the former's decision. Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524.

[4] Annotation: 62 A.L.R. 1352, 1353.

[5] Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706.

[6] Bennett v. Jackson, 186 Ind. 533, 116 N. E. 921, citing R. C. L.; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524; State v. American Sugar Ref. Co. 137 La. 407, 68 So. 742, citing R. C. L.; State v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; Re Opinion to Governor, 55 R. I. 56, 178 A. 433, citing R. C. L.

The dictum in Bennett v. Jackson, 186 Ind. 533, 116 N. E. 921, citing R. C. L., to the effect that the people being the repository of the right to alter or reform their government, their will and wishes must be consulted before the legislature can proceed to call a convention, is severely attacked and criticized in Re Opinion to Governor, 55 R. I. 56, 178 A. 433, citing R. C. L., which points out that the rule should be that the enactment of a law for calling

in the early history of the country the view was entertained that the people could legally assemble in convention and revise their Constitution without the sanction of the legislature; this doctrine is no longer recognized.[7] In the absence of any provision in the Constitution on the subject, it seems that the legislature alone can give legality to a convention.[8] Where a change in the Constitution is made under proceedings initiated by the legislature, it is not because the legislature possesses any inherent power to change the existing Constitution through a convention, but because it provides the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained.[9]

§ 27. —Powers of Conventions.—A constitutional convention is not a coordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions.[10] People who, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention.[11]

It has been said that a convention has no inherent, but only delegated, powers.[12] Nevertheless, the new Constitution prepared by a convention

a convention is within the power of a legislature, unless expressly forbidden.

[7] State v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

[8] State v. American Sugar Ref. Co. 137 La. 407, 68 So. 742, citing R. C. L.; State ex rel. Wineman v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97.

[9] Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

"Long-established usage has settled the principle that a general grant of legislative power carries with it the authority to call conventions for the amendment or revision of the Constitution; and even where the only method provided in the Constitution for its own modification is by legislative submission of amendments, the better doctrine seems to be that such provision, unless in terms restrictive, is permissive only and does not preclude the calling of a constitutional convention under the implied powers of the legislative department." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[10] State v. Doyle, 138 La. 350, 70 So. 322, citing R. C. L.; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

"In differentiating the functions of legislatures and conventions with relation to the species of law over which they have power, the important thing to note is that the one denominated fundamental is, generally speaking, the work only of a convention, a special and extraordinary assembly, convening at no regularly recurring periods, but whenever the harvest of constitutional reforms has become ripe; while, on the other hand, the ordinary statute law, whose provisions are tentatory and transient, is, regularly at least, the work of a legislature—a body meeting periodically at short intervals of time. It is thoroughly settled that, under our Constitutions, state and Federal, a legislature cannot exercise the functions of a convention—cannot, in other words, take upon itself the duty of framing, amending, or suspending the operation of the fundamental law. . . . Whenever a Constitution needs a general revision, a convention is indispensably necessary. . . . In consonance with the principle that legislatures in their ordinary legislative capacity are not competent to frame or draft organic law and in accordance with universal practice, and from the very necessity of the case, amendments to an existing Constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. . . . Where authority is specifically granted to the legislature by the Constitution to prepare and submit amendments, that establishes its competency, and, to the extent of the specific authorization and within its limitation, it is always to be considered as chosen for the purpose." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[11] Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239; State v. American Sugar Ref. Co. 137 La. 407, 68 So. 742, citing R. C. L.; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563; Re Opinion to Governor, 55 R. I. 56, 178 A. 433, citing R. C. L.

[12] Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

Annotation: 72 Am. Dec. 78.

"No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in a time of profound tranquillity and for a people living under self-established, safe institutions." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error

derives its force from the action of the people, and not from that of the legislature which may have issued the call for the constitutional convention. Within the scope of the power delegated to the convention, it seems that its right is unlimited to make changes in the state Constitution, especially in regard to matters of procedure. Thus, it has been held that the courts would not interfere although a convention disregarded instructions contained in the legislative call that a particular article of the new Constitution should be submitted separately to the vote of the people.[13] The character and extent of a Constitution that may be framed by the convention is generally considered as being free from any limitations other than those contained in the Constitution of the United States. If on its submission to the people it is adopted, it becomes the measure of authority for all the departments of government—the organic law of the state, to which every citizen must yield an acquiescent obedience.[14]

A constitutional convention has full control of all its proceedings and may provide in such manner as it sees fit to perpetuate its records, either by printing or by manuscript.[15] On the other hand where the legislative call directs a convention to submit proposed amendments to the voters of the state and expressly directs that the election to decide for or against amendments be conducted as general elections have been previously conducted, it has been held that this provision is mandatory and that the convention cannot provide otherwise by its ordinance.[16]

The powers of legislation permitted to a convention are apparently limited to preliminary, temporary, and provisional measures. Thus, it has been held that a constitutional convention has no more power than the legislature to grant, by ordinance or otherwise, new trials or to interfere with vested rights.[17]

§ 28. Legislative Resolutions as to Amendments.—The normal procedure established for the making of particular amendments to a state Constitution requires that such amendments must first be proposed by a joint resolution of the legislature,[18] and sometimes it is provided that such resolution shall be approved by two successive legislatures.[19] Even in such a case, however, where the Constitution also provides for initiative action, a constitutional provision requiring a constitutional amendment to be twice approved by the legislature before submission to the people does not require an amendment initiated by the people to be twice voted on by them.[20]

dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

13 Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

14 Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312.

15 Goodrich v. Moore, 2 Minn. 61, Gil. 49, 72 Am. Dec. 74.
Annotation: 72 Am. Dec. 78.

16 Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

17 Lawson v. Jeffries, 47 Miss. 686, 12 Am. Rep. 342.

18 Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.
In Oklahoma by virtue of the provisions of the Constitution, Art. 24, § 1, the people have vested the legislature with the function or power to submit amendments to the Constitution, such amendments to be ratified or rejected by the people at an election to be held throughout the state. McAlister v. State, 95 Okla. 200, 219 P. 134, 33 A.L.R. 1370.

In the absence of constitutional restraints and where exercised by a majority of a constitutional quorum, the power given by the Constitution to the senate "to determine the rules of its proceedings" extends to the determination of the propriety and effect of any action taken by the senate under the Constitution, including the right of a majority of a constitutional quorum to reconsider the passage by a three-fifths vote of a proposed amendment to the Constitution. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.
When the senate duly determines that the passage by it of a proposed amendment to the Constitution has been reconsidered, such determination is binding on the courts and such reconsideration nullifies the vote of adoption, and the proposed amendment has the status of a pending matter in the senate. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

19 State v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; People v. Westchester County Nat. Bank, 231 N. Y. 465, 132 N. E. 241, 15 A.L.R. 1344.

The power of the legislature to initiate changes in the existing organic law is a delegated power and one which is generally to be strictly construed under the limitations imposed by the authority by which it has been conferred. In submitting propositions for the amendment of the Constitution, the legislature is not exercising its legislative power or any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power which is conferred upon it by the people and which might with equal propriety have been conferred upon either house, the governor, a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given and is measured by the terms in which it has been conferred; and it cannot be extended by the legislature to any other object or enlarged beyond these terms. Accordingly, it has been judicially stated that the legislature is not authorized to assume the function of a constitutional convention and propose for adoption by the people a revision of the entire Constitution under the form of an amendment or submit to their votes a proposition which, if adopted, would, by the very terms in which it is framed, be inoperative.[1]

It is usually held that a constitutional provision as to amending the Constitution, otherwise than by a convention, is mandatory, and not directory. The reason for such a construction is obvious. The Constitution is the organic and fundamental law, and to permit a change in it without a strict adherence to the rules therein laid down would be a step in the direction of the destruction of the stability of the government.[2]

§ 29. —Entries on Legislative Journals.—In some states the full text of the proposed amendments must be entered on the journals of each house of the legislature, and a failure to do so constitutes a fatal defect rendering nugatory the whole amendment, notwithstanding its subsequent ratification by the people,[3] though slight irregularities in procedure may not be fatal.[4] In many

20 Annotation: 62 A.L.R. 1350.

1 Johnson v. Craft, 205 Ala. 386, 87 So. 375, citing R. C. L.; Clements v. Hall, 23 Ariz. 2, 201 P. 87, citing R. C. L.; Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Campbell v. Eugene, 116 Or. 264, 240 P. 418, citing R. C. L. (concurring opinion).
Annotation: Ann. Cas. 1915C, 240.
"The proposal of amendments to the Constitution is not a power inherent in the legislative department, but must be conferred by a special grant of the Constitution; and in the absence of such a provision, the legislature has no capacity thus to initiate amendments." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

2 Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; State ex rel. Wineman v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.
Annotation: 15 Ann. Cas. 786.
As to details of the procedure, as contrasted with the method discussed in this section, see infra, § 32.

3 McAdams v. Henley, 169 Ark. 97, 273 S. W. 355, 41 A.L.R. 629; People v. Loomis, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251.
Annotation: 6 A.L.R. 1227, s. 41 A.L.R. 640; 3 Ann. Cas. 756; 9 Ann. Cas. 587; 15 Ann. Cas. 786.
The proposal of an amendment to the Constitution is void, unless the amendment is entered in extenso on the journals of each of the two houses of the General Assembly, and a mere identifying reference by title or otherwise is insufficient. McAdams v. Henley, 169 Ark. 97, 273 S. W. 355, 41 A.L.R. 629.
The omission from the Senate journal of substantial amendments by the House of Representatives to the Senate's resolution proposing an amendment to the Constitution invalidates the amendment, although it is duly adopted by the electors. Ibid.

4 McAdams v. Henley, 169 Ark. 97, 273 S. W. 355, 41 A.L.R. 629; People ex rel. Elder v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815.
Annotation: 6 A.L.R. 1230, s. 41 A.L.R. 641.
The omission of mere immaterial words from the journal record of a proposed amendment to the Constitution will not defeat the amendment, under a constitutional

other jurisdictions a resolution proposing a constitutional amendment need not be set out verbatim in the legislative journals, provided it is fully and clearly identified by its title and each house has the resolution in its actual possession when it is passed.[5]

§ 30. —Executive Approval and Publication of Resolutions.—The joint resolution of a legislature proposing amendments to a state Constitution does not as a rule require the approval of the governor of the state. Although vetoed, the resolution possesses full force and validity, and the judiciary may issue writs of mandamus where necessary to compel ministerial officers to perform duties in reference to its publication.[6]

After a proposed amendment has been passed by one session of the legislature, publication of the text of the amendment is usually required to be made throughout the state.[7] It has been held that publication must be made substantially for the full period. Therefore, publication for two weeks is insufficient.[8] A failure to make publication for one week in a three months' period will not necessarily invalidate the amendment.[9] It has also been held that the

provision that proposed amendments shall be entered on the journal. McAdams v. Henley, 169 Ark. 97, 273 S. W. 355, 41 A.L.R. 629.

[5] Oakland Paving Co. v. Tompkins, 72 Cal. 5, 12 P. 801, 1 Am. St. Rep. 17; Worman v. Hagan, 78 Md. 152, 27 A. 616, 21 L.R.A. 716; Re Ming, 42 Nev. 472, 181 P. 319, 6 A.L.R. 1216, explaining and distinguishing State ex rel. Stevenson v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895, on the ground that concerning the amendment invalidated in the Tufly Case, an examination of the journals showed no entry of any sort that could be identified as that of the amendment under consideration; Boyd v. Olcutt, 102 Or. 327, 202 P. 431, citing R. C. L.; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

Annotation: 6 A.L.R. 1228, s. 41 A.L.R. 640; 1 Am. St. Rep. 21; 3 Ann. Cas. 756.

Under the Constitution of Washington, providing that constitutional amendments may be proposed in either branch of the legislature and, if agreed to by two thirds of the members of each branch, shall be entered on their journals with the ayes and noes thereon and be submitted to the electors for their approval at the next general election, entries made on the journals, referring to a proposed amendment in the language of its title, that being sufficient as such, were sufficient without copying such proposed amendment in the journals in full. Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

[6] People v. Ramer, 62 Colo. 128, 160 P. 1032, citing R. C. L.; Collier v. Gray, 116 Fla. 845, 157 So. 40, citing R. C. L.; State v. American Sugar Ref. Co. 137 La. 407, 68 So. 742, citing R. C. L.; Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412; Warfield v. Vandiver, 101 Md. 78, 60 A. 538, 61 A. 568, 4 Ann. Cas. 492; State ex rel. Wineman v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.

Annotation: 4 Ann. Cas. 703.

As to the jurisdiction of courts in reference to the constitutional proceedings, see infra, §§ 33, 34.

[7] Cooney v. Foote, 142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916B, 1001; State v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

Annotation: 15 Ann. Cas. 786.

[8] State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560.

The Montana Constitution provides that the Secretary of State shall cause a proposed amendment or amendments to the Constitution to be published in full in at least one newspaper in each county for three months previous to the next general election, and Article 3, § 29, declares that the provisions of the Constitution are mandatory and prohibitory, unless otherwise expressly declared. The court held that although the provision for publication is mandatory, a substantial, as distinguished from a literal, compliance therewith is sufficient; the words "mandatory" and "directory" are employed in the same sense whether applied to statutes or constitutional provisions; the distinction is between such provisions as must be obeyed according to the substantial import of their terms and those which ought to be obeyed, but disobedience to which does not invalidate what is done under them. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39.

The Montana Constitution, providing that proposed amendments to the Constitution shall be published in full in at least one newspaper in each county, if such there be, for three months prior to the next general election for members of the legislative assembly, etc., is satisfied by publication weekly in a weekly newspaper or once a week in a daily or semiweekly publication. Ibid.

[9] State v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781; Manos v. State, 98 Tex. Crim. Rep. 87, 263 S. W. 310, citing R. C. L.

The Secretary of State, prior to the submission of the amendment to Article 5, § 1, of the Montana Constitution, vesting in the people initiative and referendum powers, provided for the previous publication thereof. In most of the counties the publication covered the full period of three months

publication of proposed constitutional amendments, with the statutes of the year, after they have been concurred in by both houses of the legislature sufficiently complies with a requirement of publication for three months before election, although their publication was from sixteen to eighteen months prior thereto, especially where this mode of publication of the proposed amendments had been uniformly followed in numerous instances.[10]

An existing constitutional provision that amendments proposed to the Constitution shall be published for six months immediately preceding the next general election must yield to a subsequent amendment, conferring initiative and referendum powers, which provides that initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon.[11]

§ 31. Submission to Vote of People.—The seriousness of an election involving constitutional changes has been well pointed out. An election which takes place to decide on the adoption or rejection of a fundamental law can have no permanent value whatever unless the question has been fairly before the people for a period sufficiently long to enable them to discuss the matter thoroughly and under circumstances allowing a free discussion.[12]

One indication of a recognition of the seriousness of the matter of making changes in the fundamental law is the requirement established in several states that when more than one amendment is submitted to the electorate at the same election, such amendments must be so submitted as to enable the electors to vote on each separately.[13] The purpose of such a constitutional provision is to prevent voters from being required to vote for something which they disapprove in order to register approval of other propositions tied up therewith.[14] Questions arise under such provisions as to whether particular amendments embrace more than one subject or whether the entire amendment is germane to a single general subject.[15] The rule has been laid down that a constitutional amendment which embraces several subjects, all of which are germane to the general subject of the amendment, will, under such a requirement, be upheld as valid and may be submitted to the people as a single proposition.[16]

immediately prior to the day of election. In about one third of the number, however, the publication was made for thirteen consecutive weeks only, from and after July 27, 1906, the earliest day of publication, the election being held November 6th following, leaving ten days or more, and in one instance twenty-three days, intervening between the day of the last publication and the day of the election. The court held that there was a substantial compliance with the constitutional requirement and that the publication was sufficient. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39.

A constitutional amendment may be sustained as having been correctly adopted when the court is unable to take judicial notice of an alleged defect in the publication of the amendment before its ratification by the electorate. Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

[10] State v. Grey, 21 Nev. 378, 32 P. 190, 19 L.R.A. 134.

[11] Annotation: 62 A.L.R. 1350.

[12] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[13] Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502; People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; Cooney v. Foote, 142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916B, 1001; Re Denny, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722; State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723; State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; State v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

Annotation: 94 A.L.R. 1511.

[14] Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502.

Annotation: 94 A.L.R. 1513.

[15] Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

[16] Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d)

One court has held that an amendment to a state Constitution conferring initiative and referendum powers with reference to proposing amendments to the Constitution does not abrogate an existing constitutional provision limiting the number of amendments that may be proposed or submitted at the same time, in the absence of anything in the said amendment reserving the power to submit more than the allowed number. Another court, however, has reached a directly opposite result in construing very similar constitutional provisions, though perhaps slightly more conflicting.[17]

In other states this general restriction as to the manner of submission of amendments does not exist, and constitutional amendments may embrace more than one subject.[18]

A constitutional prohibition to the effect that a statute shall embrace but a single subject and similar constitutional restrictions relating to the title and subject matter of statutes have no application to acts of the legislature proposing an amendment to the Constitution.[19]

549, 94 A.L.R. 1502; People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39 (initiative and referendum); State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008 (initiative and referendum).

Annotation: 94 A.L.R. 1511, 1512.

Only one amendment is submitted, within the meaning of a constitutional provision that if more than one proposed amendment shall be submitted at any election such proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately, if the different changes contained in the proposed amendment all relate to matters necessary to be dealt with in some manner in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended and if, logically speaking, they should stand or fall as a whole; but if any one of the propositions embodied in a proposed amendment, although not directly contradicting the others, does not refer to such matters, or if it is such that the voters supporting it would not be reasonably expected to support the principle of the others, then there are in reality two or more amendments to be submitted and the proposed amendment falls within the constitutional prohibition. Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502.

A proposed constitutional amendment providing for a license tax on the business of copper mining, making the tangible property of public service corporations engaged in the production, sale, or distribution of gas, water, or electricity assessable for taxation upon the valuation fixed by the State Corporation Commission for rate-making purposes and converting the State Tax Commission from a statutory into a constitutional body with prescribed powers, is, although relating to the single general subject of taxation, violative of a constitutional provision that if more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately. Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502.

It has repeatedly been held that the initiative and referendum need not be submitted as separate amendments for the vote of the people since together they are essential parts of a single scheme. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008. Annotation: L.R.A.1917B, 16.

The submission of an amendment reserving to the people three powers, one relating to the initiation of constitutional amendments, and the other two to the initiative and referendum as to statutes, was held proper in State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723, but that case is overruled in Power v. Robertson, 130 Miss. 188, 93 So. 769, cited in annotation: 94 A.L.R. 1518.

An amendment providing for the election of all judges, the fixing of their terms of office, and the division of the state into court districts has been held void under a constitutional provision requiring amendments, if more than one is submitted at one time, to be submitted in such a manner and form that the people may vote for or against each amendment separately. State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652 (this case has been overruled by State ex rel. Collins v. Jones, 106 Miss. 522, 64 So. 241, cited in annotation: 94 A.L.R. 1518).

The varying Mississippi decisions have been made in spite of adherence to the same fundamental principle. The unsettled result has been occasioned by the application of the rule to the particular fact situation involved in each case. Annotation: 94 A.L.R. 1518.

17 Annotation: 62 A.L.R. 1350.

18 People v. Sours, 30 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

19 People ex rel. Elder v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; Cooney v. Foote, 142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916B, 1001; State ex rel. Wineman v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97.

Annotation: 94 A.L.R. 1510; Ann. Cas. 1916B, 1004; Ann. Cas. 1917E. 739.

Georgia Const. Art. 3, § 7, ¶ 8, which provides that "no law or ordinance shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof," applies

With reference to the number of votes which must be cast to ratify proposed amendments, there is a wide diversity, not only of the constitutional provisions controlling the question, but also of the interpretations given to these provisions by the courts. In some states the requirement for ratification is a majority of the electors voting on the amendments in question. In the states having such a provision it has been held that a simple majority as to each amendment is adequate without reference to the number of votes cast on other propositions at the same election.[20] In some jurisdictions it is sufficient if a mere majority of the votes in reference to the amendments are in favor of their adoption where the Constitutions require ratification by a "majority of the electors."[1] In other states a similar provision has been held to require a majority of all the voters voting at the election at which the proposed amendment is submitted, and a mere majority of those voting on the amendment itself has not been deemed sufficient.[2] Difficulty is also encountered in the interpretation of the provision found in some states that in submitting proposed constitutional amendments, a "majority of all the votes cast at the election" is necessary for their adoption.[3] This has been construed to mean a major portion of the highest vote cast for any purpose at the election at which the proposed amendment is submitted, and not simply a majority of those who vote on the adoption or rejection of the particular constitutional amendment.[4] Elsewhere a "majority of the votes cast" has been held to mean only a majority of the votes cast on the particular proposition, and not the majority of the highest vote for any purpose to which the election pertained.[5]

The counting of the votes in the estimation of the majority and the rejection of the ballots which are to be excluded involve similar questions. It has been stated that ballots properly rejected are to be excluded from the computation of votes cast for or against proposed constitutional amendments, under a provision requiring their approval or ratification by a majority of the qualified electors voting thereon.[6] Under a provision that if it shall appear that a majority of the qualified electors voting shall have voted for the proposed amendment, it shall be inserted by the next succeeding legislature as a part of the Constitution, and not otherwise, amended returns of an election upon a constitutional amendment, showing the number of electors appearing at the polls and voting, legally or otherwise, whose votes may or may not have been counted in ascertaining the result of the election are of no value, since they do not show the number of qualified electors voting, for the reason that although a qualified voter succeeds in getting his name on the poll list and a

to legislation which the General Assembly may finally pass and has no reference to the proposals to amend the Constitution. The legislative proposal of 1912 to amend Art. 6, § 7, ¶ 1, of the Constitution is not invalid on account of any collision with Art. 3, § 7, ¶ 8, of that instrument. Cooney v. Foote, 142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916B, 1001.

The proposal of 1912 is not repugnant to Art. 3, § 7, ¶ 17, of the Constitution, which declares that "the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made." Cooney v. Foote, 142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916B, 1001.

20 People ex rel. Elder v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251.

Annotation: 22 L.R.A.(N.S.) 478.

1 Green v. State Canvassers, 5 Idaho, 130, 47 P. 259, 95 Am. St. Rep. 169; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.

Annotation: 22 L.R.A.(N.S.) 479.

2 Re Denny, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722; State ex rel. Blair v. Brooks, 17 Wyo. 344, 99 P. 874, 22 L.R.A.(N.S.) 478.

Annotation: 22 L.R.A.(N.S) 479.

3 State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

Annotation: 22 L.R.A.(N.S.) 478, 480.

4 State v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

Annotation: 48 L.R.A. 652; 22 L.R.A. (N.S.) 480.

5 Annotation: 22 L.R.A.(N.S.) 482.

6 Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251.

ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections.[7] Another court has held that under a constitutional provision declaring that initiative measures should become effective if approved by a majority of votes cast, if the votes cast equaled one third of the total votes cast at such election, the term "votes cast at such election" meant the same as "number of voters voting at such election" and has held that since the court judicially knew that more than one third of the voters voting on the amendment voted for its adoption, it was constitutionally adopted.[8]

In some states it is within the power of the legislature to provide for the counting of straight party votes in favor of a proposed constitutional amendment indorsed by the political parties of the state and made a part of their ticket.[9]

§ 32. Strictness as to Procedure.—The general rule is that an amendment to a Constitution does not become effective as such unless it has been duly adopted in accordance with the provisions of the existing Constitution.[10] The procedure and requirements established for the amendment of the fundamental law are mandatory and must be strictly followed,[11] in order to effect a valid amendment.[12] None of the requisite steps may be omitted.[13]

On the other hand, the rule has been laid down that after ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state Constitution[14] or the legality of a new Constitution;[15] and unless the courts are satisfied that the Constitution has been violated in the submission of a proposed amendment, they should uphold it.[16] The view is taken that substance is more important than form, and that the will of the legislature lawfully expressed in proposing an amendment and the will of the people expressed at the proper time and in the proper manner in ratifying such amendment ought not to be lightly disregarded.[17] This liberal interpretation applies rather to the manner of compliance with constitutional requirements in regard to amendments than to a total omission or disregard of such a requirement, for it has not generally been held that an essential requirement may be entirely omitted.[18]

3. Jurisdiction of Courts

§ 33. Generally.—Since amendments to Constitutions derive their force from the people, it is generally recognized that judicial tribunals have no right to question the wisdom or expediency of changes made in the fundamental law.[19] Nevertheless, the power to ascertain the validity of changes in the Constitution resides in the courts, and they have, with practical uniformity, exercised the authority to determine the validity of proposal, submission, or ratification of change in the organic law.[20] Consequently, the judicial department of the government invariably has the right to consider whether the legislative department and its agencies have observed constitutional requirements in attempting to amend the Constitution and may set aside their acts in case they have not done so.[1] When a constitutional amendment has been submitted, the single inquiry for the courts is whether the fundamental law has been complied with and whether the amendment has received the sanction of the popular approval in the prescribed manner.[2]

On the other hand, where questions such as whether certain portions of a new Constitution should be separately submitted to the vote of the people are left for the determination of a constitutional convention, it has been held that no appeal lies to the judiciary and any error can be corrected only by the people themselves, by rejecting the work of the convention.[3]

7 State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723, overruled on other grounds in Power v. Robertson, 130 Miss. 188, 93 So. 769, cited in annotation in 94 A.L.R. 1518.

8 Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

9 State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781.

10 Ulter v. Moseley, 16 Idaho, 274, 100 P. 1058, 133 Am. St. Rep. 94, 18 Ann. Cas. 723; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion).

11 Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; School Dist. v. Pontiac, 262 Mich. 338, 247 N. W. 474, 787, citing R. C. L.; State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; State v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895.
Annotation: 10 L.R.A.(N.S.) 152.

12 McAdams v. Henley, 169 Ark. 97, 273 S. W. 355, 41 A.L.R. 629.
The provision of the organic law requiring proposed amendments of the Constitution to "be agreed to by three-fifths of all the members elected to each house" of the legislature is mandatory, and it clearly contemplates that such amendments shall be agreed to by the deliberate, final, affirmative vote of the requisite number of the members of each house at a regular session. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

13 State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560.

14 People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34; State v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39, distinguishing State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; Weeks v. Ruff, 164 S. C. 398, 162 S. E. 450, citing R. C. L.

15 Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524.

16 People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

17 Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; State v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; Weeks v. Ruff, 164 S. C. 398, 162 S. E. 450, citing R. C. L.
Annotation: 10 L.R.A.(N.S.) 149 et seq.
Where a constitutional amendment was submitted to the qualified voters of the state for ratification or rejection, the fact that in one county the printed ballots contained only a form of vote for ratification, and no form for voting against it, will not alone cause the amendment, after ratification, to be declared void. Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.
It is not necessary that a proposed constitutional amendment be printed in full upon the official ballot, but it is sufficient if enough is printed upon the ballot to identify the amendment and show its character and purpose. State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781.

18 Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

19 Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815.
As to questions concerning the wisdom and expediency of statutory provisions, see infra, § 138.
As to the court's jurisdiction to determine the reasonableness of enactments passed in the exercise of the police power, see infra, §§ 305, 306.
As to the duty of the courts with relation to the Constitution, see infra, § 88.

20 Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; Green v. State Bd. of Canvassers, 5 Idaho, 130, 47 P. 259, 95 Am. St. Rep. 169; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Re Denny, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722; Warfield v. Vandiver, 101 Md. 78, 60 A. 538, 4 Ann. Cas. 692; State ex rel. McClurg v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781; State ex rel. Stevenson v. Tufly, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895; Bott v. Wurts (State, Bott, Prosecutor, v. Wurts) 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; State ex rel. Wineman v. Dahl, 6 N. D. 81, 68 N. W. 418, 34 L.R.A. 97; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568; Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

1 Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524; Bott v. Wurts (State, Bott, Prosecutor, v. Wurts) 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; Boyd v. Olcott, 102 Or. 327, 202 P. 431, citing R. C. L.; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.
Annotation: Ann. Cas. 1914B, 925.
A determination of whether an amendment to the Constitution has been validly proposed and agreed to by the legislature is to be had in a judicial forum where the Constitution provides no other means for such determination. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.
As to the general power of courts to declare laws unconstitutional, see infra, §§ 86 et seq.

2 State v. Powell, 77 Miss. 543, 27 So. 927, 48 L.R.A. 652; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Bott v. Wurts (State, Bott, Prosecutor, v. Wurts) 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251.
Annotation: 15 L.R.A. 524.

3 Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

§ 34. Affirmative Judicial Relief.—It is the duty of the courts to enforce affirmatively the provisions of an existing Constitution in reference to matters connected with proposed changes in the Constitution as in other cases.[4] Therefore they may be called on to compel the proper state officials to accept petitions filed under the initiative and referendum law for the purpose of proposing amendments,[5] to publish proposed constitutional amendments as required by the Constitution,[6] to compel the making of proclamations that certain amendments have been adopted,[7] to compel the submission of duly proposed amendments, or to restrain the improper submission of amendments.[8] Where a constitutional convention, in disregard of the limitations imposed on its powers by the legislative call, endeavors to have the question of approving the new Constitution submitted to the people under election machinery established by its ordinance instead of by the general law, it seems that the courts may issue an injunction to prevent such a proceeding.[9] The view has also been expressed, however, that when the legislature authorizes the submission of a proposed amendment to the Constitution to the people, it merely places in motion the process of the people exercising their reserve legislative power, and a court of equity will not assume in advance jurisdiction to determine whether the proposed amendment, if adopted, is submitted and adopted in accordance with the law governing the same.[10]

If a proposed amendment to a state Constitution, by its terms, specifically and necessarily violates a command or limitation of the Federal Constitution, a ministerial act of an administrative officer, as part of the prescribed legal procedure for submitting the proposed amendment to the electorate, may be

[4] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.

As to the general duty of the courts to enforce the Constitution, see infra, § 88.

[5] State v. Roach, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion).

[6] Warfield v. Vandiver, 101 Md. 78, 60 A. 538, 4 Ann. Cas. 692; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion).

[7] State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); State v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

[8] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.

Annotation: Ann. Cas. 1915C, 240.

An injunction lies to prevent the submission to the voters of a new Constitution drawn by the legislature acting without constitutional authority. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

An act providing for the submission to the electors of a proposed new Constitution, being void for want of power in the legislature to adopt it, a taxpayer suing for himself and all others interested has capacity to enjoin the officers prescribed by the act from submitting the question to vote. Ibid.

The governor of the state, suing as such, and also as a citizen, taxpayer, and elector is a proper complainant in proceedings brought to enjoin the Secretary of State from publishing at public expense and certifying proposed amendments to the Constitution upon the ground that such proposed amendments are invalid because they have not been duly "agreed to by three-fifths of all the members elected to each house" of the legislature. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

An injunction will not be denied to restrain the state board of election commissioners from proceeding to submit a proposed state Constitution to the vote of the electors under an unconstitutional statute, merely because the Governor being a member of the board with supreme executive authority and control over the military forces of the State, the court would have no ability to enforce its decree in case it was disregarded, since it would not be presumed that compulsory action would be required in aid of the court's writ. Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[9] Wells v. Bain, 75 Pa. 39, 15 Am. Rep. 563.

[10] McAlister v. State, 95 Okla. 200, 219 P. 134, 33 A.L.R. 1370; State ex rel. Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L.R.A. 582.

Annotation: 33 A.L.R. 1377, 1380, s. 70 A.L.R. 733.

enjoined in order to avoid the expense of submission. If, however, the proposed amendment may, if adopted, conceivably be valid in part or as applied to some conditions, its submission should not be enjoined. In the absence of express terms to the contrary, the court, in passing on the question whether a proposed amendment to the Constitution should be submitted to the voters, must assume that the amendment is intended to be operative in accord with the Federal Constitution.[11]

The Supreme Court has stated that the general right possessed by every citizen to require that the government be administered according to law and that public moneys be not wasted does not entitle a private citizen to institute in the Federal courts a suit to secure by indirection a determination whether a constitutional amendment about to be adopted will be valid.[12]

IV. OPERATION AND EFFECT OF CONSTITUTIONS AND AMENDMENTS

A. In General

1. Effect on Existing Laws

§ 35. Prospective or Retrospective Effect.—The presumption that statutory enactments are not to be considered retrospective in their operation unless the intention so to make them clearly appears from their terms[13] has application as well to constitutional provisions.[14] The general rule is that prospective effect alone is given to provisions of state Constitutions, such as those prescribing the form and method of passing appropriation bills[15] and those prohibiting private and local bills, special legislation,[16] and constitutional exemptions from taxation.[17]

Limitations on future legislation against special laws do not operate to repeal existing laws enacted in the manner allowed by the former Constitution.[18] Moreover, rights existing under a statute in force when a constitutional amendment is adopted are not affected by it unless it contains some provision which expressly abrogates such pre-existing rights.[19]

[11] Gray v. Winthrop, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804.

Annotation: 94 A.L.R. 812.

[12] Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 S. Ct. 274.

[13] See Statutes [Also 25 R. C. L. p. 787, § 35].

[14] San Antonio v. San Antonio Pub. Serv. Co. 255 U. S. 547, 65 L. ed. 777, 41 S. Ct. 428; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 S. Ct. 210; Calhoun County v. Galbraith, 99 U. S. 214, 25 L. ed. 410; Phœnix Assur. Co. v. Fire Dept. 117 Ala. 631, 23 So. 843, 42 L.R.A. 468; Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 149 P. 560, 9 A.L.R. 597; Wilcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; Strickler v. Colorado Springs, 16 Colo. 61, 26 P. 313, 25 Am. St. Rep. 245; Paulsen v. Reinecke, 181 La. 917, 160 So. 629, 97 A.L.R. 1184; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004; Hall v. Dunn, 52 Or. 475, 97 P. 811, 25 L.R.A. (N.S.) 193; Evans v. Phillipi, 117 Pa. 226, 11 A. 630, 2 Am. St. Rep. 655; Kirby v. Western U. Teleg. Co. 4 S. D. 105, 7 S. D. 623, 55 N. W. 759, 65 N. W. 37, 30 L.R.A. 612, 46 Am. St. Rep. 765; Jungk v. Holbrook, 15 Utah, 198, 49 P. 305, 62 Am. St. Rep. 921; Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404.

Where the judgment of a Circuit Court is rendered prior to the date of the taking of effect of a new Constitution, but the petition in error to the Supreme Court is not filed until after that time, the case is a "pending case" within a saving provision of the Constitution that "all pending cases and proceedings in the Circuit Court shall proceed to judgment and be determined by the respective Courts of Appeals, and the Supreme Court, as now provided by law." Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio St. 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004.

[15] Cutting v. Taylor, 3 S. D. 11, 51 N. W. 949, 15 L.R.A. 691.

[16] Ingersoll v. Nassau Electric R. Co. 157 N. Y. 453, 52 N. E. 545, 43 L.R.A. 236.

[17] Robinson v. Indiana & A. Lumber & Mfg. Co. 128 Ark. 550, 194 S. W. 870, 3 A.L.R. 1426.

[18] See infra, § 36.

[19] Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 149 P. 560, 9 A.L.R. 597.

On the adoption of a Constitution containing a prohibition against the reelection of public officers, it has been held that the prohibition applies only to future elections and does not affect those holding office at the time the new Constitution took effect.[20] It has also been held, however, that a constitutional amendment prescribing the terms of office may be applied to existing officeholders.[1]

As a general rule, the provisions of a new Constitution take effect immediately and become operative on pending litigation[2] and on criminal proceedings in reference to offenses committed prior to its adoption;[3] yet a constitutional amendment may be prospective and therefore not applicable to pending cases.[4] By reason of the prohibition contained in the Federal Constitution as to ex post facto laws,[5] a provision of a new Constitution in reference to past offenses will not be permitted to have the effect of repealing the prior one so as to deprive accused persons of any rights formerly secured by the fundamental law.[6]

§ 36. —On Existing Statutes.—When a new Constitution is established, it is customary to insert a provision that all statutes in force and not inconsistent with the new Constitution shall continue until amended or repealed by the legislature,[7] although it is generally recognized that such laws remain in force without an express provision to that effect.[8] The rule is well exemplified by statutes relating to investment by political subdivisions in corporate securities, followed by constitutional amendments forbidding such action without a vote by a large percentage of the voters. The Constitution of a state, restricting the power of the legislature to authorize municipal subscriptions, is not retroactive so as to have any controlling application to laws in existence when the Constitution was adopted.[9]

[20] State v. Giles, 2 Pinney (Wis.) 166, 52 Am. Dec. 149.

[1] Worman v. Hagan, 78 Md. 152, 27 A. 616, 21 L.R.A. 716.

[2] Cassard v. Tracy, 52 La. Ann. 835, 27 So. 368, 49 L.R.A. 272.

[3] State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L.R.A. 238.

[4] Lem Woon v. Oregon, 229 U. S. 586, 57 L. ed. 1340, 33 S. Ct. 783; State v. Ross, 55 Or. 450, 104 P. 596, 106 P. 1022, 42 L.R.A. (N.S.) 601.

[5] See Vol. 12, Subd. X.

[6] State v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472.

[7] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 457, 14 S. Ct. 592; Norton v. Brownsville, 129 U. S. 479, 32 L. ed. 780, 9 S. Ct. 331; Callaway County v. Foster, 93 U. S. 567, 23 L. ed. 911; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; Daniel v. Daniel, 116 Wash. 82, 198 P. 728, 27 A.L.R. 177.

An ordinance which is in effect when a new state Constitution is adopted, although inconsistent therewith, may be within the saving clause of such Constitution, even though no action may have been taken under the ordinance until afterward. Sears v. Akron, 246 U. S. 242, 62 L. ed. 688, 38 S. Ct. 245.

[8] Vahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 4 L.R.A. 462, 14 Am. St. Rep. 73; Leser v Lowenstein, 129 Md. 244, 98 A. 712; citing R. C. L.; Norfolk S. R. Co. v. McArtan, 185 N. C. 201, 116 S. E. 731, citing R. C. L.; State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L.R.A.(N.S.) 720, Ann. Cas. 1914D, 949.

Existing decisions in effect previous to the adoption of a new state Constitution, and not nullified directly or by necessary implication, survive with full force and effect. Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723, overruled on another point on a later appeal in 53 S. Ct. 285, 31 S. E. 252, 43 L.R.A. 101, 69 Am. St. Rep. 855.

[9] Scotland County Ct. v. United States, 140 U. S. 41, 35 L. ed. 351, 11 S. Ct. 697; Scotland County v. Hill, 132 U. S. 107, 33 L. ed. 261, 10 S. Ct. 26; Dallas County v. McKenzie, 110 U. S. 686, 28 L. ed. 285, 4 S. Ct. 184; Jonesboro v. Cairo & St. L. R. Co. 110 U. S. 192, 28 L. ed. 116, 4 S. Ct. 67; Louisville v. Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775; Cass County v. Gillett, 100 U. S. 585, 25 L. ed. 585; Calhoun County v. Galbraith, 99 U. S. 214, 25 L. ed. 410; Schuyler County v. Thomas, 98 U. S. 169, 25 L. ed. 88; Ray County v. Vansycle, 96 U. S. 675, 24 L. ed. 800; Henry County v. Nicolay, 95 U. S. 619, 24 L. ed. 394.

A change in a state Constitution relating to municipal subscription is not retroactive so as to have any controlling application to laws in existence when the Constitution was adopted. It does not destroy a vested right of a corporation to receive bonds from a municipal corporation, although they are not issued. Dallas County v. McKenzie, 110 U. S. 686, 28 L. ed. 285, 4 S. Ct. 184; Jonesboro v. Cairo & St. L. R. Co. 110 U. S. 192, 28 L. ed. 116, 4 S. Ct. 67; Schuyler County v. Thomas, 98

Although a new Constitution may contain prohibitions as to special legislation, it will not be construed as effecting a repeal of, or making inoperative, special laws passed before its adoption.[10]

In cases in which a constitutional provision, instead of being restrictive, permits greater freedom of action, the same principles seem to apply. Thus, it has been held that a constitutional provision which empowers the voters of every city to enact and amend their municipal charter does not, of itself, alter existing charters.[11]

It may also be stated to be a general principle that a statute existing at the adoption of a Constitution cannot be upheld if it is opposed to the plain terms of the Constitution.[12] If there is a conflict between a statute and such a constitutional provision, the former must give way,[13] since all statutes which are actually inconsistent with a new Constitution are repealed by implication, unless they constitute contracts within the meaning of the Federal provision prohibiting an impairment of the obligation of contracts.[14] Statutes may be nullified, in so far as future operation is concerned, by the Constitution as well as by statute, since the Constitution is the direct, positive, and limiting voice of the people and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants.[15] An amendment of the Constitution must be held to amend the existing statute

U. S. 169, 25 L. ed. 88; Ray County v. Vansycle, 96 U. S. 675, 24 L. ed. 800.

The Missouri Constitution of 1865 prohibiting municipal corporations from becoming stockholders in corporations or loaning credit, unless by a two-thirds vote, was prospective—not retroactive—and did not destroy power given by the charters of corporations then in existence. Scotland County v. Hill, 132 U. S 107, 33 L. ed. 261, 10 S. Ct. 26; Dallas County v. McKenzie, 110 U. S. 686, 28 L. ed. 285, 4 S. Ct. 184; Cass County v. Gillett, 100 U. S. 585, 25 L. ed. 585; Schuyler County v. Thomas, 98 U. S. 169, 25 L. ed. 88; Ray County v. Vansycle, 96 U. S. 675, 24 L. ed. 800; Henry County v. Nicolay, 95 U. S. 619, 24 L. ed. 394; Scotland County v. Thomas, 94 U. S. 682, 24 L. ed. 219; Callaway County v. Foster, 93 U. S. 567, 23 L. ed. 911.

The prohibition in the Missouri State Constitution of 1865, of municipal subscriptions to the stock of, or loans of credit to, companies or corporations, without the previous assent of two thirds of the qualified voters at a regular or special election, had the effect to limit the future exercise of legislative power, but did not take away any authority granted before that Constitution went into operation. Scotland County Ct. v. United States, 140 U. S. 41, 35 L. ed. 351, 11 S. Ct. 697; Scotland County v. Hill, 132 U. S. 107, 33 L. ed. 261, 10 S. Ct. 26.

The Mississippi constitutional provision forbidding any municipal corporation to become a stockholder in, or to lend its credit to any company unless with the assent of two thirds of the qualified voters was prospective only. Calhoun County v. Galbraith, 99 U. S. 214, 25 L. ed. 410.

[10] Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 149 P. 560, 9 A.L.R. 597; Smith v. Simmons, 129 Ky. 93, 110 S. W. 336, 130 Am. St. Rep. 426; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.

Annotation: 93 Am. St. Rep. 106.

[11] Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; Hall v. Dunn, 52 Or. 475, 97 P. 811, 25 L.R.A.(N.S.) 193.

[12] Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531.

[13] State v. Wilson, 162 S. C. 413, 161 S. E. 104, 81 A.L.R. 580.

[14] Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531; Washingtonian Home v. Chicago, 157 Ill. 414, 41 N. E. 893, 29 L.R.A. 798; Fesler v. Brayton, 145 Ind. 71, 44 N. E. 37, 32 L.R.A. 578; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Pennsylvania R. Co. v. Bowers, 124 Pa. 183, 16 A. 836, 2 L.R.A. 621; Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L.R.A. 648; State ex rel. Dunning v. Giles, 2 Pinney (Wis.) 166, 1 Chand. 112, 52 Am. Dec. 149.

An act inconsistent with a new Constitution of the state becomes void. United States v. Villato (C. C.) 2 Dall. 370, 1 L. ed. 419, Fed. Cas. No. 16,622.

A statute inconsistent with a subsequently adopted Constitution is annulled by the latter's adoption. Criswell v. Montana C. R. Co. 18 Mont. 167, 44 P. 525, 33 L.R.A. 554.

That part of the Prohibition Amendment to the Federal Constitution which embodies the prohibition is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the Amendment prohibits. National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486.

As to the obligation of contracts generally, see Vol. 12, Subd. XI.

[15] Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.

law to agree with such an amendment,[16] and a constitutional amendment exempting from taxation and local assessment property used for burial of the dead is presumed to have altered, and not merely to have declared, the previously existing law.[17] The exception must be noted, however, that where the constitutional provision is not self-executing,[18] in some instances a state statute is not thereby superseded.[19] If it is self-executing, it necessarily annuls all inconsistent acts of the legislature passed prior to its adoption.[20]

A new Constitution, by removing a limitation on the scope of an existing statute, may have the effect of extending its operation without restricting it.[1] On the other hand, it has been held that a law, originally void as in contravention of prohibitions contained in the Constitution, is not made valid by the repeal of such constitutional limitations.[2]

The repeal of the Eighteenth Amendment to the Federal Constitution and the effect of that repeal on legislation enacted in connection with that amendment have presented problems of a nature allied to the general question of the effect of constitutional changes in existing laws. The ratification of the Twenty-first Amendment operated not only to repeal the Eighteenth Amendment, but also to carry down with that repeal the National Prohibition Act together with the saving provision in that act enacted by Congress that penalties theretofore incurred were not to be extinguished by the repeal of the statute. Such a saving clause can only apply to the repeal of statutes by Congress and cannot save an act from falling because of the adoption of a constitutional amendment by the people, which amendment acts as a repeal of the authority for the original enactment of the statute.[3] With respect to the status, after repeal of the Eighteenth Amendment, of state liquor legislation which was valid and operative during the period in which the amendment was in force, it may be stated with little hesitation that, with a few possible exceptions, the repeal of the amendment in no way affects the operation of any state constitutional provision or statute which was in force under the amendment.[4] Some possible exceptions, however, are to be found among those statutes which were enacted by some of the states, after the adoption of the amendment, expressly for the purpose of co-operating with the Federal Government in the enforcement of the Volstead Act and were so phrased as almost to depend on the existence of that act for their own effectiveness.[5]

[16] Tombstone v. Macia, 30 Ariz. 218, 245 P. 677, 46 A.L.R. 828.
The amendment of a constitutional provision, however, authorizing municipal corporations to engage in any business for which they might grant a franchise, by permitting them to engage in industrial pursuits, does not amend a statute authorizing the issuance of bonds for the former purpose passed prior to the amendment and re-enacted without material change after it, so as to permit the issuance of bonds for an industrial pursuit. Ibid.

[17] Hollywood Cemetery Asso. v. Powell, 210 Cal. 121, 291 P. 397, 71 A.L.R. 310.

[18] As to distinctions between provisions which are and are not self-executing, see infra, §§ 73, 74.

[19] Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; Hawley v. Anderson, 99 Or. 191, 190 P. 1097, 195 P. 358, citing R. C. L.; Newport News v. Woodward, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625.

[20] Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Monaghan v. Lewis, 5 Penn. (Del.) 218, 59 A. 948, 10 Ann. Cas. 1048; Wren v. Dixon, 40 Mo. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.

[1] People v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399.

[2] Mt. Pleasant v. Vansice, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193.
As to the validation of unconstitutional laws generally, see infra, § 151.

[3] United States v. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 S. Ct. 434, 89 A.L.R. 1510.
Annotation: 89 A.L.R. 1515, 1516.
The unqualified repeal of the Eighteenth Amendment deprived the courts of jurisdiction to entertain any further proceedings in pending prosecutions under the National Prohibition Act, even where the crime was committed before the repeal and while such act was in effect. United States v. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 S. Ct. 434, 89 A.L.R. 1510.

[4] Jefferson County Distillery Co. v. Clifton, 249 Ky. 815, 61 S. W. (2d) 645, 88 A.L.R. 1361.
Annotation: 88 A.L.R. 1368.

[5] Annotation: 88 A.L.R. 1369.

§ 37. —On Common Law.—To the extent to which constitutional provisions are in conflict with the common law, whether pertaining to rights or remedies, the common-law principles must be regarded as superseded.[6]

2. Time of Taking Effect

§ 38. Generally.—The Constitution of the United States did not take effect at once on its being ratified by the necessary number of states, the approval of which was made a requisite to its validity. By the instrument itself, it was provided that the ratifications by the states were to be reported to the Congress, whose continuing existence was recognized by the convention. The new government did not actually commence until the old government in fact expired.[7]

The moment an amendment to the Federal Constitution is ratified, however, it becomes effective as law, although the acts against which it is directed are prohibited only after expiration of a year from its ratification.[8] Thus, the date of the consummation of the ratification of an amendment to the Federal Constitution which is, by its own terms, to go into effect one year after being ratified, rather than the date of the proclamation of the Secretary of State, is controlling upon the question when such an amendment becomes operative.[9] Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative.[10]

A state Constitution taking the place of the organic laws of a territory is not operative until after its actual adoption by the people.[11] Similarly, where an existing Constitution provides that proposed amendments, if ratified by the requisite majority, shall become part of the Constitution, it is usually held that amendments take effect from the time of their actual ratification.[12] As a general rule, it may be stated that the most radical change in form does not destroy an existing government until after ratification and after the means are furnished of giving full effect to the new government superseding it under new or altered constitutional provisions.[13]

The governor's proclamation as to the adoption of a constitutional amendment in some jurisdictions is conclusive of that fact, and the amendment thereby becomes eo instanti a part of the Constitution.[14] Elsewhere, the rule is established that a proposed amendment to the Constitution goes into operation on the canvass of the vote, and not at the time it is cast.[15]

In a case where the provisions of a new state Constitution will become effective upon the affirmative vote and sanction of the electorate, if the schedule accompanying the Constitution and election expressly requires the polls to be kept open until sunset, the people cannot be regarded as having adopted the new Constitution or amendments, nor can the Constitution or amendments

[6] See Common Law, ante, p. 157, § 4.

[7] Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. ed. 124.
See supra, § 19.

[8] Druggan v. Anderson, 269 U. S. 36, 70 L. ed. 151, 46 S. Ct. 14.

[9] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510.

[10] United States v. Chambers, 291 U. S. 217, 78 L. ed. 763, 54 S. Ct. 434, 89 A.L.R. 1510.

[11] Territory ex rel. Parker v. Smith, 3 Minn. 240, Gil. 164, 74 Am. Dec. 749.

[12] Seneca Min. Co. v. Osmun, 82 Mich. 573, 47 N. W. 25, 9 L.R.A. 770.

[13] Cucullu v. Louisiana Ins. Co. 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199.

[14] Worman v. Hagan, 78 Md. 152, 27 A. 616, 21 L.R.A. 716.

[15] State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115.

be considered as in force and effect until the time for the closing of the polls on election day has elapsed.[16]

§ 39. Schedules and Continuity of Constitutions.—Whenever a state makes changes in its fundamental law or adopts a new Constitution, there is no break in the continuity of the government and in theory the new Constitution is an amendment of the one formerly existing, since a new Constitution does not create a new state.[17] Accordingly, the principle is recognized that there is a presumption that the people in adopting a Constitution are familiar with the previous and existing laws.[18] In order that no inconvenience may result by reason of changes arising out of the adoption of a new Constitution, it is the custom to adopt a schedule which will set forth temporary regulations covering the interim before the new machinery of government is thoroughly established.[19] The only office of a schedule is to provide for the transition from the old to the new government and to obviate confusion which would otherwise arise during the transition period, and this fact may be material in determining the construction and effect to be given to provisions contained in schedules.[20]

It seems that provisions in a schedule or ordinance attached to a state Constitution may be abrogated under certain circumstances in a manner different from that required for making changes in the Constitution itself. Thus, it has been held that an ordinance appended to a state Constitution is revocable either entirely or pro tanto by agreement between the state government and the United States, and that the powers therein disclaimed, on assent of the constituted authorities of the United States and of the state, can be resumed and immediately exercised by the state authorities.[1]

B. Supremacy of Constitutions and Supreme Laws

1. Federal Constitution and Supreme Laws

§ 40. Supremacy of United States Constitution.—The Constitution of the United States is by its own declaration, Article 6, § 2, the supreme law of the land.[2] It is binding on all officers and departments of both the Federal[3] and

[16] Louisville v. Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775.

[17] State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L.R.A.(N.S.) 720.

[18] Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191.

[19] Mann v. Osborne, 128 Okla. 32, 261 P. 146, citing R. C. L.; State ex rel. Dunning v. Giles, 2 Pinney (Wis.) 166, 1 Chand. 112, 52 Am. Dec. 149.

[20] Mann v. Osborne, 128 Okla. 32, 261 P. 146, citing R. C. L.; Willis v Kambach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009.

One function of a schedule is to set forth the dates when the various provisions of the new Constitution are to take effect. Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

[1] Duke v. Cahawba Nav. Co. 10 Ala. 82, 44 Am. Dec. 472.

[2] Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583; Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871, 40 S. Ct. 495, 10 A.L.R. 1504; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648, 15 Ann. Cas. 135; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 S. Ct. 925; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Farmer's & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513; Strader v. Graham, 10 How. (U. S.) 82, 13 L. ed. 337; Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; Worcester v. State, 6 Pet. (U. S. 515, 8 L. ed. 483; per Trimble, J., Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; Gray v. Winthrop, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804; Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58, 70 A.L.R. 449; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed without opinion in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; Louisville & N. R. Co. v. Falls City Ice & Beverage Co. 249 Ky. 807, 61 S. W. (2d) 639, 91 A.L.R. 509; Com. v. International Harvester Co. 131 Ky. 551, 115 S. W. 793, 133 Am. St. Rep. 256; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 819; State ex rel. Tate v. Sevier, 333 Mo. 662, 62 S. W. (2d) 895, 87 A.L.R. 1315, writ of certiorari denied in 290 U. S. 679, 78 L. ed. 536, 54 S. Ct. 102; State v. Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; Dow v. Norris, 4 N. H. 16, 17 Am. Dec. 400; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

The Federal Constitution is the supreme law of the land and all its applicable provisions are binding upon all within the territory of the United States. Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287, 17 Ann. Cas. 1247.

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." L. N. Dantzler Lumber Co v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669.

[3] Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802.

The right to continue the exercise of a privilege granted by the government cannot be made to depend upon the grantee's submission to a condition prescribed by the government, which is hostile to the provisions of the Federal Constitution. United States v. Chicago, M. & St. P. & P. R. Co. 282 U. S. 311, 75 L. ed. 359, 51 S. Ct. 159.

[4] Cary v. Curtis, 3 How. (U. S.) 236, 11 L. ed. 576; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

"The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648.

[5] Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. ed. 224; People v. Western Union Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326.

State courts, equally with Federal courts, are under an obligation to guard and enforce every right secured by the Federal Constitution. Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, rehearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511.

Equity cannot arbitrarily grant relief in the face of the Constitution of the United States and the laws thereof. Federal Land Bank v. Wilmarth, 218 Iowa, 339, 252 N. W. 507, 94 A.L.R. 1338.

Law and court-made rules of expediency must not be placed above the Constitution. State v. Arregui, 44 Idaho, 43, 254 P. 788, 52 A.L.R. 463.

[6] State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717.

[7] Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

The Constitution is the mandate of a sovereign people to its servants and representatives which no one of them has a right to ignore or disregard. John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

The Constitution and laws of the United States are the supreme law of the land and to them every citizen of every state owes obedience; whether in his individual or official capacity. Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

[8] Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

[9] United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; Worcester v. Georgia, 6 Pet. (U. S.) 512, 8 L. ed. 483; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562.

state governments,[4] including every court, whether it derives its authority from a state or from the United States,[5] individual members of the legislature,[6] and the whole people of the United States, governing and restraining their acts and conduct, whether exercised by their representatives in the Federal Congress or by their representatives in state conventions and state Constitutions.[7] Every part of the Constitution is as binding on the Congress as on the people,[8] and acts of Congress which are not consistent with its provisions are invalid.[9]

No public policy of a state can be allowed to override the positive guaranties of the Federal Constitution.[10]

It is sometimes argued that the existence of an emergency allows the existence and operation of powers, national or state, which violate the inhibitions of the Federal Constitution. The rule is quite otherwise. No emergency justifies the violation of any of the provisions of the United States Constitution. An emergency, however, while it cannot create power, increase granted power, or remove or diminish the restrictions imposed upon power granted or reserved, may furnish the occasion for the exercise of power already in existence, but not exercised except during an emergency.[11]

§ 41. —Inferiority of State Laws and Constitutions.—A state law, even if passed in the exercise of the state's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution.[12] No act of a state legislature which is repugnant to the Constitution of the United States can be of any validity.[13]

Even a state Constitution is of no effect where it is in conflict with the Constitution of the United States.[14] While every word of a state Constitution

The Constitution of the United States is the supreme law of the land to which all statutes must conform. Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758.

The Federal Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down. United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

Statutes enacted by Congress and treaties made by the President and the Senate must yield to the paramount and supreme law of the Constitution. United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456.

[10] Hill v. Woodward, 100 Miss. 879, 57 So. 294, 39 L.R.A.(N.S.) 538, Ann. Cas. 1914A, 390; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Kintz v. Harriger, 99 Ohio St. 240, 124 N. E. 168, 12 A.L.R. 1240.

See CONFLICT OF LAWS, ante, p. 304, § 7.

[11] See Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481.

Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, and 96 A.L.R. 312, 826 (comment discussion of governmental powers, both national and state, which are exercised during peace-time emergency).

For specific discussions of subjects involved in emergency legislation, such as police moratory laws pertaining to mortgages, and rent laws, and Federal regulation as to gold clauses in contracts, etc., see infra, § 252, and Vol. 12, Subd. XIV.

[12] Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. ed. 845, 6 S. Ct. 670; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; Baily v. Gentry, 1 Mo. 164, 13 Am. Dec. 484.

[13] Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 S. Ct. 623; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State v. Miller, 87 Ohio St. 12, 99 N. E. 1078, 44 L.R.A.(N.S.) 712, Ann. Cas. 1913E, 761; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

Every act of a state legislature repugnant to the Constitution is absolutely void. Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857.

Legislative acts of a state which are hostile in their purpose or mode of enforcement to the authority of the National Government or which impair the rights of citizens under the Constitution are invalid and void. Taylor v. Thomas, 22 Wall. (U. S.) 479, 22 L. ed. 789.

The protection of the Federal Constitution applies, whatever the form in which the legislative power of the state is exerted, whether by a Constitution, an act of the legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, such as an ordinance of a municipality or an order of a commission. Standard Computing Scale Co. v. Farrell, 249 U. S. 571, 63 L. ed. 780, 39 S. Ct. 380.

[14] Standard Computing Scale Co. v. Farrell, 249 U. S. 571, 63 L. ed. 780, 39 S. Ct. 380; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 S. Ct. 623; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; Gray v. Winthrop, 115 Fla. 721, 156 So. 270, 94

should be given its appropriate meaning and effect, yet the meaning and legal effect of words in a state Constitution may be restrained or modified by applicable controlling commands or limitations contained in the Federal Constitution.[15] Within their proper sphere of operation, the applicable provisions of the Federal Constitution are to be regarded as the dominant authority in the interpretation and enforcement of provisions of a state Constitution.[16] Accordingly, provisions in state Constitutions have been held to be void as inconsistent with Federal constitutional provisions prohibiting the enactment of ex post facto laws,[17] the taking of property without just compensation,[18] and the impairment of the obligation of contracts.[19]

§ 42. Supremacy of Acts of Congress.—Since the Constitution of the United States provides (Article 6, § 2) that the laws made in pursuance thereof shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding,[20] an act of Congress constitutionally passed within the limits of its authority becomes a part of the supreme law of the land in connection with the Federal Constitution itself.[1] Such Federal laws control the Constitutions and laws of the respective states and cannot be controlled by them.[2] They operate essentially as a part of the law of each state and are as binding on its authorities and people as its own local Constitution and laws[3] in the same manner as if they were actually embodied in the Federal Constitution.[4] Thus, the several states are subject to the

A.L.R. 804; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

A state must recognize as binding an amendment to the Constitution of the United States and enforce it within its own limits, without reference to any inconsistent provisions in its own Constitution or statutes. Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567.

[15] Gray v. Winthrop, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804.

[16] Ibid.

The Nineteenth Amendment to the Constitution of the United States automatically strikes from state Constitutions or statutes the word "male," wherever it is used in defining electors. Annotation: 71 A.L.R. 1332.

As to the construction and interpretation of Constitutions generally, see infra, §§ 49 et seq.

[17] State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33, overruled on another point in Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620.

As to this prohibition generally, see infra, § 352.

[18] Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 S. Ct. 246; Re Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L.R.A. 781, 79 Am. St. Rep. 574.

Annotation: 49 L.R.A. 781.

[19] Fisk v. Jefferson, 116 U. S. 131, 29 L. ed. 587, 6 S. Ct. 329; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

See also Vol. 12, Subd. XI.

[20] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

[1] Bunch v. Cole, 263 U. S. 250, 68 L. ed. 290, 44 S. Ct. 101; Flint v. Stone Tracey Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 S. Ct. 670; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

[2] Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Mondou v. New York, N. H. & H. R. Co. 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; United States v. Miller (C. C. A. 8th) 28 F. (2d) 846, 61 A.L.R. 405; Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58, 70 A.L.R. 449; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L.R.A.(N.S.) 31.

Annotation: 47 L.R.A.(N.S.) 31.

A state Constitution can no more detract from the force of Federal law than can a state statute. Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 44 S. E. 294, 64 L.R.A. 501, 94 Am. St. Rep. 948.

[3] Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196.

[4] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436.

supremacy of the laws made in pursuance of the Federal Constitution,[5] and a state law is void if contrary to a valid act of Congress.[6]

Every judicial officer, whether of a state or of a Federal court, is under the obligation of an oath to recognize the supremacy of valid acts of Congress.[7]

Congress has no power by authorization or ratification to give effect to a state law or Constitution not consistent with the Constitution of the United States.[8]

§ 43. Supremacy of Treaties.—It is expressly declared in the Federal Constitution that all treaties made, or which shall be made, under the authority of the United States, together with the Constitution itself and the laws made in pursuance thereof, shall be the supreme law of the land.[9] Therefore, when anything in the Constitution or laws of a state is in conflict with a treaty, the latter must prevail.[10]

It is well settled that an act of Congress may supersede a prior treaty[11] and

[5] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Exchange Nat. Bank v. United States, 147 Wash. 176, 265 P. 722, 62 A.L.R. 139, affirmed in 279 U. S. 80, 73 L. ed. 621, 49 S. Ct. 321.

[6] Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; Sinnot v. Davenport, 22 How. (U. S.) 227, 16 L. ed. 243; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 47 L.R.A.(N.S.) 31.

[7] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436.

[8] Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

[9] Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513; Re Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630; Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A.L.R. 166, writ of certiorari denied in 254 U. S. 643, 65 L. ed. 454, 41 S. Ct. 14; Trott v. State, 41 N. D. 614, 171 N. W. 827, 4 A.L.R. 1372.

[10] House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 S. Ct. 295; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Haver v. Yaker (Jecker v. Magee) 9 Wall. (U. S.) 32, 19 L. ed. 571; Sinnot v. Davenport, 22 How. (U. S.) 227, 16 L. ed. 243; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Carver v. Jackson, 4 Pet. (U. S.) 1, 7 L. ed. 761; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Re Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L.R.A. 84; Re Moynihan, 172 Iowa, 571, 151 N. W. 504, 154 N. W. 904, L.R.A.1916D 1127; Re Anderson, 166 Iowa, 617, 147 N. W. 1098, 52 L.R.A.(N.S.) 686, affirmed in 245 U. S. 170, 62 L. ed. 225, 38 S. Ct. 109; Ahrens v. Ahrens, 144 Iowa, 486, 123 N. W. 164, Ann. Cas. 1912A, 1098; Opel v. Shoun, 100 Iowa, 407, 69 N. W. 560, 37 L.R.A. 583; Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530; Rixner's Succession, 48 La. Ann. 552, 19 So. 597, 32 L.R.A. 177; Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Re Wyman, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 601; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L.R.A.(N.S.) 105; Butschkowski v. Brecks, 94 Neb. 532, 143 N. W. 923, Ann. Cas. 1915C, 965; Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A.L.R. 166, writ of certiorari denied in 254 U. S. 643, 65 L. ed. 454, 41 S. Ct. 14; Hamilton v. Erie R. Co. 219 N. Y. 343, 114 N. E. 399, Ann. Cas. 1918A, 928, writ of error dismissed in 248 U. S. 369, 63 L. ed. 307, 39 S. Ct. 95; Trott v. State, 41 N. D. 614, 171 N. W. 827, 4 A.L.R. 1372; Bondi v. MacKay, 87 Vt. 271, 89 A. 228, Ann. Cas. 1916C, 130; Re Stixrud, 58 Wash. 339, 109 P. 343, 33 L.R.A.(N.S.) 632, Ann. Cas. 1912A, 850; Urbus v. State Compensation Comr. 113 W. Va. 563, 169 S. E. 164, citing R. C. L.

Annotation: 4 A.L.R. 1383, s. 17 A.L.R. 636; 114 Am. St. Rep. 604.

[11] Rainey v. United States, 232 U. S. 310, 58 L. ed. 617, 34 S. Ct. 429; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 S. Ct. 769; Alvarez y Sanchey v. United States, 216 U. S. 167, 54 L. ed. 432, 30 S. Ct. 361; United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 S. Ct. 629; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 S. Ct. 722; Thomas v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 S. Ct. 340; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 S. Ct. 107; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 S. Ct. 1076; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 S. Ct. 522; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 S. Ct. 623; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 S. Ct. 525; Whitney v. Robertson, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 S. Ct. 456; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 S. Ct. 247; Cherokee Tobacco (Boudinot v. United States) 11 Wall. (U. S.) 616, 20 L. ed. 227; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; Minnesota Canal & P. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L.R.A.(N.S.) 105; Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, 11 A.L.R. 166, writ of certiorari denied in 254 U. S. 643, 65 L. ed. 454, 41 S. Ct. 14; Hamilton v. Erie R. Co. 219 N. Y. 343, 114 N. E. 399, Ann. Cas.

that a subsequent treaty may supersede a prior act of Congress.[12] Accordingly, while a state law may be void as inconsistent with a treaty, an act of Congress cannot be similarly declared to be invalid.[13]

2. State Constitutions

§ 44. Generally.—A written Constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it and must control as it is written until it shall be changed by the authority that established it.[14] No function of government can be discharged in disregard of, or in opposition to, the fundamental law.[15] The state Constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates;[16] and the legislature, the executive officers, and the judiciary cannot lawfully act beyond the limitations of such Constitution.[17]

The Constitution of each state, so far as it is consistent with the provisions of the Federal Constitution, is the fundamental law of the state, is part of its supreme law, and acts passed by the legislature inconsistent therewith are invalid.[18] A state Constitution is also binding on the courts of the state[19]

1918A, 928, writ of error dismissed in 248 U. S. 369, 63 L. ed. 307, 39 S. Ct. 95.

Annotation: 4 A.L.R. 1385, s. 17 A.L.R. 636.

[12] Whitney v. Robertson, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 S. Ct. Rep. 456; J. Ribas y Hijo v. United States, 194 U. S. 315, 48 L. ed. 994, 24 S. Ct. 727; United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 S. Ct. 629; Thomas v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 S. Ct. 340; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 S. Ct. 1076; Cherokee Tobacco (Boudinot v. United States) 11 Wall. (U. S.) 616, 20 L. ed. 227.

Annotation: 4 A.L.R. 1384, s. 17 A.L.R. 635.

[13] Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 S. Ct. 525; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 S. Ct. 623.

[14] State ex rel. Crenshaw v. Joseph, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914D, 248; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Collins v. Martin, 290 Pa. 388, 139 A. 122, 55 A.L.R. 311; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802.

[15] Collins v. Martin, 290 Pa. 388, 139 A. 122, 55 A.L.R. 311.

[16] John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

[17] Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802.

[18] East St. Louis v. Amy, 120 U. S. 600, 30 L. ed. 798, 7 S. Ct. 739; Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359 writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Com. v. International Harvester Co. 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; Re Election Supers. 114 Mass. 247, 19 Am. Rep. 341; State ex rel. Putnam v. Holm, 172 Minn. 162, 215 N. W. 200, 54 A.L.R. 333; Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695; Com. v. National F. Ins. Co. 161 Va. 737, 172 S. E. 448, citing R. C. L.

The doctrine of a higher law than the Constitution has no place in American jurisprudence. State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Every state law must conform, in the first place, to the Constitution of the United States, and then to the subordinate Constitution of the particular state; and if it infringes upon the provisions of either, it is so far void. Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19.

Economic necessity cannot justify a disregard of cardinal constitutional guaranties. Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

[19] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Com. v. National F. Ins. Co. 161 Va. 737, 172 S. E. 448, citing R. C. L.

Judicial decisions, however numerous, are subject to correction by the Constitution itself. State v. Buente, 256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915D, 879.

Law and court-made rules of expediency must not be placed above the state Constitution. State v. Arregui, 44 Idaho, 43, 254 P. 788, 52 A.L.R. 463.

A judge has no more right to disregard and violate the Constitution than a criminal has to violate the law. People ex rel. Sammons v. Snow, 340 Ill. 464, 173 N. E. 8, 72 A.L.R. 798.

and on every officer and every citizen. Any attempt to do that which is prescribed in any other manner than that prescribed or to do that which is prohibited is repugnant to that supreme and paramount law and is invalid.[a]

In the light of these well-established principles, it is the obvious duty of the legislature to act in subordination to the state Constitution,[1] for with reference to the subjects upon which the Constitution assumes to speak, its declarations are conclusive upon the legislature.[2] Therefore, the adoption of a constitutional amendment providing for the adoption and promulgation of a Criminal Code does not authorize the adoption, as amendments to such Code, of provisions at variance with the Constitution.[3] Constitutional provisions also prevent the enactment of any law which extinguishes or limits the powers conferred by the Constitution.[4] A constitutional limitation which in itself is valid and not in conflict with the Federal Constitution cannot be made invalid by any act of the legislature,[5] and an act which the state Constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation except for such prohibition.[6]

The limitations on legislative action may be by implication. Thus, where a Constitution prescribes the qualifications of electors, the legislature cannot require additional qualifications.[7]

The principles stated hereinbefore with reference to the exercise of powers during emergency and the relation thereto of the provisions of the United States Constitution[8] are equally applicable to the provisions, inhibitions, and guaranties of the various state Constitutions.[9]

Political subdivisions of the state are similarly bound by the provisions of the state Constitution. For example, it has been held that county bonds, though issued under authority of a statute, are null and void if prohibited by the state Constitution.[10] Local laws enacted by a city must also be consistent with the state Constitution.[11] Thus, if the state Constitution establishes the procedure for amending city charters, the method specified is exclusive and controlling.[12]

The principle of the supremacy of a state Constitution has been applied to the fundamental law of territories.[13]

[20] Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Com. v. National F. Ins. Co. 161 Va. 737, 172 S. E. 448, citing R. C. L.

[1] Montana v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 S. Ct. 281; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B. 247, Ann. Cas. 1915A, 772; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.

[2] State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329.

[3] State v. Lange, 168 La. 958, 123 So. 639, 67 A.L.R. 1447.

[4] State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329.

[5] Beveridge v. Lewis, 137 Cal. 619, 67 P. 1040, 70 P. 1083, 59 L.R.A. 581, 92 Am. St. Rep. 188.

[6] Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; State v. Froehlick, 115 Wis. 32, 91 N. W. 115, 58 L.R.A. 757, 95 Am. St. Rep. 894.

[7] Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Moore v. Olcott, 105 Or. 269, 209 P. 498, citing R. C. L.
Annotation: 87 Am. Dec. 64.

[8] See supra, § 40.

[9] Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, and 96 A.L.R. 312, 826 (comment discussion of governmental powers, both national and state, which are exercised during peace-time emergency).
For specific discussions of subjects involved in emergency legislation, such as police moratory laws pertaining to mortgages and rent laws, and other state legislation in times of emergency, see specific sections, infra, or the specific articles involved.

[10] Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481, 44 L.R.A. 252; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.

[11] Evans v. Berry, 262 N. Y. 61, 186 N. E. 203, 89 A.L.R. 387.

[12] Uhl v. Collins, 217 Cal. 1, 17 P. (2d) 99, 85 A.L.R. 1370.

[13] An act of the territorial legislature inconsistent with the general history of our

§ 45. States in Rebellion and under Martial Law.—Questions have arisen as to the status of the Constitutions and government of the southern states during the period of the Civil War. It is now recognized that at no time were these states out of the pale of the Federal Union and that their rights under the Federal Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same as theretofore.[14] The state governments did not cease to exist, and their legislation in the exercise of such powers as appertained to them under the United States Constitution was valid; but all such acts on their part as were in hostility to the United States or in disregard of, or in conflict with, its Constitution, or were intended directly or indirectly to aid the rebellion were absolute nullities, and they cannot be invoked in support of any rights or for the protection of any persons acting under them.[15] Thus, an ordinance of a convention of a seceding state to raise means for defense of the state was held to be void as being in direct aid of those seeking to destroy the Union.[16] On the other hand, statutes without political significance and not in furtherance of the rebellion were valid, including acts for the creation of new counties, the reorganization of judicial districts, making changes in the tax laws, etc.[17]

The mandates of the Federal Constitution continued in full force and effect in the Southern states during the period of the secession. These states during that period and before their representation was restored had no more power to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or to do anything else prohibited by the Constitution of the United States than they had before the rebellion began or after the restoration of their normal position in the Union.[18]

The Federal Constitution has not inhibited military government on the theater of warfare in which the military power of the Federal Government is engaged, and therefore such government apparently should not be regarded as a violation of the Federal Constitution. Public danger may warrant the substitution of executive process for judicial process, and a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority.[19] The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of habeas corpus should be

jurisprudence and with the organic act of the territory is void. Ferris v. Higley, 20 Wall. (U. S.) 375, 22 L. ed. 383.

[14] Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Hall v. Hall, 43 Ala. 488, 94 Am. Dec. 703; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

[15] Hall v. Hall, 43 Ala. 488, 94 Am. Dec. 703; Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696; Houston v. Deloach, 43 Ala. 364, 94 Am. Dec. 689; Thomas v. Taylor, 42 Miss. 651, 2 Am. Rep. 625; Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494.

[16] State v. McGinty, 41 Miss. 435, 93 Am. Dec. 264; Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494.
Annotation: 98 Am. Dec. 511.

[17] Horn v. Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657; Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494.

[18] White v. Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685.

[19] Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L.R.A.(N.S.) 1030.

That martial law must be permitted to prevail on the actual theater of military operations in time of war is an unavoidable necessity. It results from the very nature of war, which is simply an appeal to force: and where it is being waged, it necessarily suspends and displaces the ordinary laws of the land by those usages which are known as the laws of war. If a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army. He can do this under the same necessity which will justify him, when an emergency requires it, in seizing or destroying the private property of a citizen. The authority to do either by military force is indispensable on the actual theater of war. The want of such authority might lose a battle or peril the issue of a campaign. The power to do these things is implied in the power to wage war and springs from an overruling necessity. Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159.

read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. The fact that a military occupation of a territory, in a state of peace and order, differs radically from the prosecution of a war in the same territory, is well established. Martial law is operative only in such portions of the country as are actually in a state of war and continues only until pacification. Ordinarily, the entire country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, and it is powerless to try citizens for offenses or to sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But in all the undisturbed, peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside.[20]

C. Republican Form of Government

§ 46. Generally.—A republican form of government as guaranteed by the Constitution of the United States has been defined as one which derives all its powers directly or indirectly from the people and which is administered by persons holding their offices for a limited period or during good behavior.[1] It has been said that by this phrase is understood a government by the people through representatives appointed by them, either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for that purpose.[2]

After a state has been admitted to the Federal Union, the only apparent effect of the clause guaranteeing a republican form of government appears to be a recognized limitation prohibiting the state from exchanging its republican for an antirepublican Constitution,[3] since under the Federal guaranty each state is impliedly bound forever to maintain the republican form of government.[4]

It is universally recognized that there was nothing in any of the forms of government prevailing in the original thirteen states at the time of the adoption of the Constitution which was not consistent with a republican form of government.[5] Since the Constitution of the United States did not attempt to define the essential elements of a republican form of government, it is customary to refer to the forms of government of the original states as approved criteria.[6]

Comparatively few attempts have been made to define an antirepublican form of government, yet it has been said that if a state should attempt to surrender its powers to an executive for life, with a provision that on his death that authority should pass by inheritance to his son, the form of government would no longer be republican.[7] In a republican form of government the governor or president has only a delegated power and a limited sphere of action.[8] In a republic the tenure of office may be for a short or a long period, or even for life, yet those in office are at all times answerable, either directly or indirectly, to the people, and the power to enact laws and control public servants lies with the great body of the people. From this it follows that each republic may differ in its political system or in the political machinery by which it moves, but so long as the ultimate control of its officials and affairs of state remains in its citizens, it will, in the eyes of all republics, be recognized as a government of the republican type.[9]

It has been said that no government is republican in form which fails to secure the purity of elections[10] and that the principle of majority rule is at the foundation of republican systems of government.[11]

As to other matters, the opinion has been judicially expressed that the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed on all persons of like age, sex, and condition, is in many respects considered as a distinguishing feature of the republican institutions of this country.[12] Due protection of the rights of property has in similar manner been regarded as a vital principle of republican institutions,[13] and it has been said that every republican government is in duty bound to protect all its citizens in the enjoyment of equality of rights.[14]

§ 47. Determination as to Form of Government.—Whether a state has a republican form of government is a political, and not a judicial, question, and therefore is to be determined not by the courts, but by the political department

[20] United States v. L. Cohen Grocery Co. 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 A.L.R. 1045; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281 (leading case); Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L.R.A. (N.S.) 1030; State v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L.R.A.(N.S.) 996.

War does not of itself suspend at once and everywhere constitutional guaranties of liberty and property. Martial law cannot be resorted to in that part of the country where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, although the government may be prosecuting a war for the suppression of a rebellion in other parts of the country; and if a person is arrested in such a loyal community and deprived of his liberty by order of the President of the United States as Commander in Chief and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful and the parties making it will be liable to an action therefor. Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159.

There must be an actual necessity before martial law will be proclaimed. A mere threatened invasion is not a sufficient occasion. L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669.

[1] Cochran v. Louisiana State Bd. of Edu. 281 U. S. 370, 74 L. ed. 913, 50 S. Ct. 335; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

The word "state" as it is used in the clause of the Federal Constitution guaranteeing to each state a republican form of government refers to a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written Constitution and established by the consent of the governed. Texas v. White, 7 Wall. (U. S.) 700, 19 L. ed. 227.

The constitutional provision that the United States shall guarantee to every state a republican form of government expresses the full limit of national control over the internal affairs of a state. South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110.

[2] Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

[3] Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

[4] Re Duncan, 139 U. S. 449, 35 L. ed. 219, 11 S. Ct. 573; Allyn's Appeal, 81 Conn. 534, 71 A. 794, 23 L.R.A.(N.S.) 630, 129 Am. St. Rep. 225.

[5] Ex parte Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.(N.S.) 1092, 11 Ann. Cas. 911; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

[6] Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Ex parte Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.(N.S.) 1092, 11 Ann. Cas. 911.

[7] Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

[8] State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600.

[9] Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

[10] Thomas v. Reid, 142 Okla. 38, 285 P. 92, citing R. C. L.; Cook v. State, 90 Tenn. 407, 16 S. W. 471, 13 L.R.A. 183.

[11] Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332; Thomas v. Reid, 142 Okla. 38, 285 P. 92, citing R. C. L.

[12] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231.

[13] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581.

[14] United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627.

of the Federal Government—that is, by the Congress[15]— and the decision of Congress is binding on every other department and cannot be questioned in any judicial tribunal.[16]

Congress necessarily, also, has the power to decide what government is established in the state before it can determine whether or not it is republican.[17] The admission of a new state into the Union is treated as a direct and positive declaration by Congress that its Constitution is republican in form and not inconsistent with the Constitution of the United States.[18]

Where a state is in full possession of its powers as a member of the Union and its legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law, it will be treated as continuing to enjoy a republican form of government, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of important litigation and election contests. The courts in such circumstances will not take jurisdiction on the ground of any alleged violation of the guaranty of a republican form of government.[19]

§ 48. Validity of Particular Provisions.—From time to time questions have been raised as to whether particular constitutional provisions or governmental institutions fulfil the requirements of a republican form of government. The

[15] Cochran v. Louisiana State Bd. of Edu. 281 U. S. 370, 74 L. ed. 913, 50 S. Ct. 335; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Ohio v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708; O'Neill v. Leamer, 239 U. S. 244, 60 L. ed. 249, 36 S. Ct. 54; Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Kiernan v. Portland, 223 U. S. 151, 56 L. ed. 386, 32 S. Ct. 231; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; State v. Owen, 97 Wash. 466, 166 P. 793, citing R. C. L.

Annotation: 50 L.R.A.(N.S.) 198.

Whether or not a state has ceased to be republican in form within the meaning of the guaranty in U. S. Const. Art. 4, § 4, because of its adoption of the initiative and referendum, is not a judicial question, but a political one, which is solely for Congress to determine. Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708; Kiernan v. Portland, 223 U. S. 151, 56 L. ed. 386, 32 S. Ct. 231; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224.

As to initiative and referendum, see infra, § 48.

[16] Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009; Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

It is the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and it is the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Federal Constitution as to each and every exercise of governmental power. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224.

The provision of the Federal Constitution that the United States shall guarantee to every state in the Union a republican form of government depends for enforcement upon political and governmental action through powers conferred upon Congress. Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

The courts may not treat the provisions of the Congressional Apportionment Act of August 8, 1911, under which the referendum is recognized as a part of the state legislative power for the purpose of creating congressional districts, where so treated by the state Constitution and laws, as repugnant to the republican form of government guaranteed by U. S. Const. Art. 4, § 4, since Congress is vested with the exclusive authority to uphold this guaranty. Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708.

[17] Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009; Luther v. Borden, 7 How. (U. S.) 1, 12 L. ed. 581; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

[18] Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

[19] Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009.

legislative creation and alteration of school districts and municipal corporations[20] and legislative regulations of the judicial system, such as those requiring counties to pay additional salaries of judges, have all been determined to be consistent with a republican form of government.[1] The establishment of commissions to adjust the compensation to be awarded injured workmen, under a system of industrial insurance, without resort to the courts is also valid under this clause.[2] A state government was also held to be republican in form notwithstanding women were not made voters.[3]

It is clear that this guaranty does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. The forms of local government in this country have been most varied, running all the way from pure democracy of the town meeting form of government up to such absolute control by the legislature of the state that communities have been deprived of any voice in their local affairs. In view of these facts the opinion has been expressed that the constitutional guaranty was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions.[4] On this view the commission form of government has been held not to violate the provision contained in the Federal Constitution that the United States shall guarantee to every state a republican form of government.[5] The city manager form of government is also valid.[6]

In some jurisdictions it has been held that a state cannot grant to a municipal corporation within its boundaries absolute rights and prerogatives beyond recall, since to do so would be to permit the creation of a state within a state.[7] It has been held that a constitutional amendment consolidating a city and county government into one and authorizing the people to adopt a charter for their government and to amend such charter and to provide for the election or appointment of municipal officers is not invalid as exempting a portion of the state from the provisions of the Constitution and general laws.[8]

The generally accepted view is that the system of direct legislation which has been in common use throughout the various state governments since their inception is clearly consistent with a republican form of government, even

[20] Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 S. Ct. 27.

The Federal Constitution does not prevent the people of a state from giving, if they see fit, full jurisdiction to the courts to determine the territorial boundaries of a municipal corporation, since the preservation of legislative control in such matters is not one of the essential elements of a republican form of government guaranteed by U. S. Const. Art. 4, § 4. Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665.

The guaranty to each state in U. S. Const. Art. 4, § 4, of a republican form of government cannot be invoked to invalidate in the courts the proceedings in connection with the organization and management of a drainage district. O'Neill v. Leamer, 239 U. S. 244, 60 L. ed. 249, 36 S. Ct. 54.

[1] Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

[2] State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642.

[3] Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627.

[4] Ex parte Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.(N.S.) 1092, 11 Ann. Cas. 911; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

Annotation: 67 A.L.R. 741; 50 L.R.A. (N.S.) 198, s. L.R.A.1917B, 17.

[5] Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

Annotation: 67 A.L.R. 741; 35 L.R.A. (N.S.) 803; 41 L.R.A.(N.S.) 112; 51 L.R.A. (N.S.) 632; Ann. Cas. 1912C, 999; Ann. Cas. 1915A, 1217; Ann. Cas. 1917C, 1104.

[6] Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718.

[7] Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332.

[8] People v. Sours, 31 Colo. 369, 74 P. 167, 102 Am. St. Rep. 34.

Home rule by municipalities under constitutional power is now a common form of municipal government. See supra, § 17. And see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 748, § 53].

though it may deprive the legislature of some lawmaking power or powers held by it at the adoption of the Federal Constitution. Accordingly, it has been held that such direct powers of legislation may be exercised by the people through the initiative and referendum,[9] it being pointed out that the representative character of the government still remains under that system and that the people have thereby simply reserved to themselves a larger share of legislative power, and that therefore they have not overthrown the republican form of government or substituted another in its place.[10]

V. CONSTRUCTION OF CONSTITUTIONS

A. General Principles

1. In General

§ 49. Generally.—The construction and interpretation of the provisions of the Federal and state Constitutions involve some of the most important problems in the field of constitutional law. As a matter of fact, every constitutional question depends for its ultimate solution upon the construction of Constitutions, whether it relates to powers or limitations directly pertaining to a Constitution itself or to the constitutionality of various legislative acts and the conduct and powers of the various officers of the departments of government. The final test applied in all constitutional questions is whether the act done or legislation conceived is permissible within the limits of the Constitutions and this always involves in a final analysis the meaning of the Constitutions.

As will be readily seen from an examination of the following sections of this article, questions of constitutional construction are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments, particularly statutes, although because of their fundamental dignity and weight and because of the manner in which they are adopted, Constitutions are subject in their interpretation to certain modifications of these well-known doctrines.[11] Consequently, in the determination of constitutional questions, the same rules of interpretation may be resorted to as with other laws, inasmuch as the duty imposed upon the judiciary to discover the spirit and intention of the lawgivers or the true meaning of the instrument is not less imperative than in the case of statutes.[12] Rules applicable to the construction of statutes are also applicable to the construction of provisions of the Constitution,[13] but external aids or arbitrary rules applied to the construction of a Constitution are of uncertain value and should be used with hesitation and circumspection.[14]

[9] Kiernan v. Portland, 57 Or. 454, 111 P. 379, 112 P. 402, 37 L.R.A.(N.S.) 332; State v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; State v. Owen, 97 Wash. 466, 166 P. 793, citing R. C. L.; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

Annotation: 50 L.R.A.(N.S.) 197; L.R.A. 1917B, 17.

[10] Annotation: 50 L.R.A.(N.S.) 197.

[11] **The subject, the context, and the intention of the body inserting a word in the Federal Constitution are all to be considered in determining its construction.** M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

Clauses of the Constitution which involve a conflict of governmental powers must be considered with reference to the literal meaning of the words, their connection with other words, and the general object to be accomplished. Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678.

[12] State v. Joseph, 143 La. 428, 78 So. 663, L.R.A.1918E, 1062.

[13] Padger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798; State ex rel. Dufresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329.

[14] Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348.

Many of the doctrines pertaining to the construction of Constitutions are well established. Due to the manner, however, in which these organic documents affect the life and welfare of the entire people, new problems arise constantly, involving new applications of principle.

§ 50. Uniformity of Construction.—A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable.[15] In accordance with this principle, a court should not allow the facts of the particular case to influence its decision on a question of constitutional law,[16] nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like circumstances and conditions.[17] Furthermore, Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action,[18] and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founders.[19]

[15] South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Tindall v. Searan, — Ark. —, 90 S. W. (2d) 476, citing R. C. L.; State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, citing R. C. L.; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State ex rel. Dawson v. Sessions, 84 Kan. 856, 115 P. 641, Ann. Cas. 1912A, 796; People v. Case, 220 Mich. 379, 190 N. W. 289, 27 A.L.R. 686; Ex parte Woods, 52 Tex. Crim. Rep. 575, 108 S. W. 1171, 16 L.R.A.(N.S.) 450, 124 Am. St. Rep. 1107; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (appeal dismissed in 284 U. S. 573, 76 L. ed. 498, 52 S. Ct. 15) citing R. C. L.; Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1095.

In construing Constitutions, courts have nothing to do with the argument ab inconvenienti and should not bend the Constitution to suit the law of the hour. State ex rel. Kinsworthy v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153; Keller v. State (Tex. Crim. Rep.) 87 S. W. 669, 1 L.R.A.(N.S.) 489.

A constitutional provision operates on new subjects and conditions with the same meaning and intent which it had when adopted and does not change with time or conditions. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802.

[16] Tindall v. Searan, — Ark. —, 90 S. W. (2d) 476, citing R. C. L.; Re Wallon, 16 Idaho, 737, 102 P. 374, 22 L.R.A.(N.S.) 1123; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (appeal dismissed in 284 U. S. 573, 76 L. ed. 498, 52 S. Ct. 15) citing R. C. L.

[17] Tindall v. Searan, — Ark. —, 90 S. W. (2d) 476, citing R. C. L.; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266; State ex rel. Howie v. Brantley, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (appeal dismissed in 284 U. S. 573, 76 L. ed. 498, 52 S. Ct. 15) citing R. C. L.

The rule of stare decisis is peculiarly applicable in the construction of written Constitutions. McCulley v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567.

"If ever there should be an adherence to former decisions, it should be in cases of construction of the Constitution involving the rights of citizens as declared by that instrument." Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B 247, Ann. Cas. 1915A, 772.

[18] Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (appeal dismissed in 284 U. S. 573, 76 L. ed. 498, 52 S. Ct. 15) citing R. C. L.; State ex rel. Banker v. Clausen, 142 Wash. 450, 253 P. 805, citing R. C. L.

The meaning of a Constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass upon it. Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

[19] Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (appeal dismissed in 284 U. S. 573, 76 L. ed. 498, 52 S. Ct. 15) citing R. C. L.

"We likewise wish to disclaim any view that the Constitution of this state is in abeyance because the nation is at war; or that the Constitution is inadequate to serve the state at such a time, or that the exigency justifies or has called forth any canon of construction not applicable in a season of 'profoundest peace.' Whatever is legally done by any public agency at any time must be done either with the sanction or without the inhibition of the Constitution; for, like the national charter, it 'is a law for rules and people, equally in war and

The preservation of uniformity of construction of the Federal Constitution operates to limit the effect of any state interpretations of that document. If the effect of a clause of the Constitution depended wholly or in part upon the construction given it by a state, different constructions would be given it by different states and the spirit, if not the letter, would be broken.[20]

§ 51. Flexibility of Constitutions.—A Constitution usually announces certain basic principles to serve as the perpetual foundation of the state. It is not intended to be a limitation on its healthful development nor an obstruction to its progress. Accordingly, the courts are not inclined to adopt such a technical or strained construction as will unduly impair the efficiency of the legislature to meet responsibilities occasioned by changing conditions of society.[1] It is proper to assume that a Constitution is intended to meet and be applied to new conditions and circumstances as they may arise in the course of the progress of the community.[2] The courts in this country have shown a determination to give our written Constitutions, by interpretation, such flexibility as will bring them into accord with what the courts believe to be public interest.[3] Their terms and provisions are being constantly expanded and enlarged by construction to meet the advancing and improving affairs of men.[4]

peace, and . . . no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended,' without its authority for any reason." State v. Stewart, 54 Mont. 504, 171 P. 755, Ann. Cas. 1918D, 1101.

[20] Per M'Lean, J., in Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

[1] Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.

[2] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Merrick v. N. W. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 S. Ct. 227; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 S. Ct. 900; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; State v. Missouri P. R. Co. 96 Kan. 609, 152 P. 777, Ann. Cas. 1917A, 612, affirmed in 248 U. S. 276, 63 L. ed. 239, 39 S. Ct. 93, 2 A.L.R. 1589; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State ex rel. Columbus v. Ketterer, 127 Ohio St. 483, 189 N. E. 252, citing R. C. L.; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.

Under the test of reasonableness many acts are sustained today which would not have been sustained one hundred years ago, since industrial conditions and political theories are constantly changing. Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179.

In construing the general language or policy of a Constitution, the changed social, economic, and governmental conditions and ideals of the time and the problems which the changes have produced are to be considered as well as the conditions prevailing at the time of the adoption of the Constitution. Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489.

[3] Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.
Annotation: 45 L.R.A.(N.S.) 996.

[4] Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, L.R.A.1916B, 931, Ann. Cas. 1917C, 474; State v. Wolfer, 119 Minn. 368, 138 N. W. 315, 42 L.R.A.(N.S.) 978, Ann. Cas. 1914A, 1298; State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.

While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016.

The language of a Constitution is generally extended to include new things and new conditions of the same class as those specified, which were not known or contemplated when it was adopted. Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348.

The concept of the general welfare is not static. "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the na-

It has been authoritatively stated that as changes come in social and political life the Federal Constitution embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable.[5] It has also been said that a Constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth,[6] and that a written Constitution is to be interpreted in the same spirit in which it was produced.[7]

The principle of flexibility, however, does not overbalance or destroy the doctrine of uniformity; the actual meaning of the provision always remains the same. In making a Constitution applicable to conditions which did not exist when it was drafted, the courts cannot read into the instrument provisions which are not there[8] merely because so doing will be helpful in dealing with conditions which exist at the present.[9]

§ 52. Effect of Partial Invalidity.—The question may arise as to the effect of partial invalidity of a constitutional amendment. In accordance with the rules governing the invalidity of portions of a statute,[10] it has been held that where part of an amendment to a state Constitution is invalid because it violates the Fourteenth Amendment to the Federal Constitution, if the several parts of the amendment are separable, the valid portions may be saved, unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in an entirety, in which event, if part of the amendment falls, the whole must fall with it.[11] Similarly, the inclusion in a state Constitution of a clause prohibiting a greater charge by a carrier for a short than for a long haul, applying to commerce coming from or going to other states, in violation of the commerce clause of the Federal Constitution, does not render the whole article void if such an invalid provision can be eliminated and leave a complete scheme of legislative prohibition against discrimination by carriers.[12]

2. Construction as Entirety

§ 53. Generally.—In construing a constitutional provision, it is the duty of

tion. What is critical or urgent changes with the times." Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319.

[5] Patton v. United States, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.
In Missouri v. Holland, 252 U. S. 416, 64 L. ed. 641, 40 S. Ct. 382, 11 A.L.R. 984, Justice Holmes said: "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism: it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

[6] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.

[7] Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.

[8] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio St. 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381.

[9] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[10] See infra, §§ 152 et seq.

[11] State ex rel. Johnson v. Chicago, B. & Q. R. Co. 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661.
Annotation: Ann. Cas. 1916D, 15. See also annotation: 15 A.L.R. 332.

[12] California Adjustment Co. v. Atchison, T. & S. F. R. Co. 179 Cal. 140, 175 P. 682, 13 A.L.R. 274.

the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision,[13] and if there is an apparent repugnancy between different provisions, the court should harmonize them if possible.[14] The rules of construction of constitutional law require that two sections be so construed, if possible, as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.[15]

It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument.[16] Frequently, the meaning of one provision of a Constitution standing by itself may be obscure or uncertain, but is readily apparent

[13] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; State ex rel. Biggs v. Corley, 36 Del. 135, 172 A. 415, citing R. C. L.; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; Boise-Payette Lumber Co. v. Challis Independent School Dist. 46 Idaho, 403, 268 P. 26, citing R. C. L.; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Davidson v. Hine, 151 Mich. 294, 115 N. W. 246, 15 L.R.A.(N.S.) 575, 123 Am. St. Rep. 267, 14 Ann. Cas. 352; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; People v. Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552; Goughnour v. Brant, 47 N. D. 368, 182 N. W. 309, citing R. C. L.; State ex rel. Germain v. Ross, 39 N. D. 630, 170 N. W. 121, citing R. C. L.; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; State ex rel. Cloud v. State Election Bd. 169 Okla. 363, 36 P. (2d) 20, 94 A.L.R. 1007; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Finerty v. First Nat. Bank, 92 Okla. 102, 218 P. 859, 32 A.L.R. 1326; Smart v. Craig County, 67 Okla. 141, 169 P. 1101, L.R.A.1918C, 313; Ex parte Crump, 10 Okla. Crim. Rep. 133, 135 P. 428, 47 L.R.A. (N.S.) 1036; Dell Rapids v. Irving, 7 S. D. 310, 64 N. W. 149, 29 L.R.A. 861; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah, 369, 98 P. 180, 28 L.R.A.(N.S.) 255, 131 Am. St. Rep. 850; Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781, citing R. C. L.

Annotation: 18 Ann. Cas. 725.

[14] Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Lamborn v. Bell, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; People v. Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552; People ex rel. McClelland v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399; State ex rel. Germain, v. Ross, 39 N. D. 630, 170 N. W. 121, citing R. C. L.; State ex rel. Cloud v. State Election Bd. 169 Okla. 363, 36 P. (2d) 20, 94 A.L.R. 1007; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Morrow v. Corbin, 122 Tex. 553, 62 S. W. (2d) 641, citing R. C. L.; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah, 369, 98 P. 180, 28 L.R.A.(N.S.) 255, 131 Am. St. Rep. 850; Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781, citing R. C. L.; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; State v. Bancroft, 148 Wis. 124, 134 N. W. 330, 38 L.R.A. (N.S.) 526.

Annotation: 18 Ann. Cas. 725.

Distinct provisions of the Constitution are repugnant to each other only when they relate to the same subject, are adopted for the same purposes, and cannot be enforced without material and substantial conflict. State ex rel West v. Butler, 70 Fla. 102, 69 So. 771, citing R. C. L.

While both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Federal Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561.

[15] State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33.

[16] Old Wayne Mut. L. Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 S. Ct. 236; People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131; People ex rel. Nauert v. Smith, 327 Ill. 1, 158 N. E. 418, citing R. C. L.; Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989; Baltimore v. Fuget, 164 Md. 335, 165 A. 618, 88 A.L.R. 1058; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; Goughnour v. Brant, 47 N. D. 368, 182 N. W. 309, citing R. C. L.; State ex rel. Germain v. Ross, 39 N. D. 630, 170 N. W. 121, citing R. C. L.; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934; State ex rel. Cloud v. State Election Bd. 169 Okla. 363, 36 P. (2d) 20, 94 A.L.R. 1007; Thomas v. Reid, 142 Okla. 38, 285 P. 92, citing R. C. L.; Smart v. Craig County, 67 Okla. 141, 169 P. 1101, L.R.A.1918C, 313; Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781, citing R. C. L.

when resort is had to other portions of the same instrument.[17] The best mode of ascertaining the meaning affixed to any word or sentence by a deliberative body is by comparing it with the words and sentences with which it stands connected.[18] and a constitutional provision[19] or a phrase in a constitutional provision must be read in connection with the context.[20] Noscitur a sociis is a rule of construction applied to all written instruments. The obscurity of any particular word may be removed by reference to associated words. And the meaning of a term may be enlarged or restricted by referring to the object of the whole clause in which it is used.[1] Therefore, particular phrases of a Constitution must be construed with regard to the remainder of the instrument and to the express intent of the constitutional convention in adopting it.[2] For example, the first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia.[3]

Cases may arise where it is impossible to harmonize or reconcile portions of a Constitution. In such a case, if there is a conflict between a general and a special provision in a Constitution, the special provision must prevail in respect of its subject matter, as it will be regarded as a limitation on the general grant.[4]

§ 54. Amendments and Earlier Provisions of Constitution.—Many troublesome questions of constitutional construction arise in the interpretation of constitutional amendments with reference to the earlier constitutional provisions to which they have been added. In accordance with the general rule that harmony in constitutional construction should prevail whenever possible,[5] generally an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law.[6] A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except in so far as the old order is in manifest repugnance to the new Constitution, but such a provision should be read in the light of the former law and existing system.[7] Amendments, however, are usually adopted for the express purpose of making changes in the existing system. Hence, it is very likely that conflict may arise between an amendment and portions of a Constitution adopted at an earlier time. In such a case the rule is firmly established that an amendment duly adopted is a part of the Constitution and is to be construed accordingly. It cannot be questioned on the

[17] Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781, citing R. C. L.

[18] Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055.

[19] Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 S. Ct. 728; Baltimore v. Fuget, 164 Md. 335, 165 A. 618, 88 A.L.R. 1058.

[20] People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131.

[1] Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 S. Ct. 728.

[2] Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

[3] Patton v. United States, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263.

Determination of whether the right to jury trial in disbarment proceedings is guaranteed by the constitutional provision that the right of trial by jury shall remain inviolate, or is preserved upon the theory that such right, originally given by the Mississippi territorial legislation, being in force at the time of the adoption of the first state Constitution, received constitutional sanction, involves consideration of other pertinent provisions of the Constitution, because its several provisions must be construed as standing in pari materia. Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

[4] Annotation: 18 Ann. Cas. 727.

[5] See supra, § 53.

[6] Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798.

[7] State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436.

ground that it conflicts with pre-existing provisions.[8] If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions.[9] If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded.[10]

Still another occasion of conflict may arise in the case of two amendments adopted at the same time, but impossible of reconciliation. It is the rule, of course, that when two amendments are adopted on the same day, they should, if possible, be so construed that effect may be given to both,[11] but where a section of the Constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the Constitution or to reconcile the same, then they must both fail.[12]

[8] State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; State ex rel. Johnson v. Chicago, B. & Q. R. Co. 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661.

[9] Allison v. Phœnix, 44 Ariz. 66, 33 P. (2d) 927, 93 A.L.R. 354; Cooper v. Lewis, 177 Ga. 229, 170 S. E. 68, 88 A.L.R. 808; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; Ex parte Kerby, 103 Or. 612, 205 P. 279, 36 A.L.R. 1451; Egan Independent Consol. School Dist. v. Minnehaha County. — S. D. —, 270 N. W. 527, 108 A.L.R. 572.

Annotation: 18 Ann. Cas. 726.

"Effect should be given to every part of the instrument as amended." Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926.

A constitutional provision can be impliedly abrogated by the adoption of another and later one which is antagonistic to it, although the original provision may in terms remain unaltered. People ex rel. Carter v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L.R.A. 836.

The original wording of a constitutional provision cannot be used to add anything to its meaning after an amendment thereof "so as to read" in a specified manner. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798, L.R.A.1917A, 1223.

An amendment of a provision of the state Constitution that questions upon bond issues shall be submitted to the vote of "property taxpayers," by adding the word "real," in front of the word "property," operates to qualify another constitutional provision that no county, town, school district, or other municipal corporation shall for any purpose become indebted to an amount exceeding a stated percentage of the taxable property therein without the assent of a majority of the "property taxpayers" therein voting at an election to be held for that purpose. Allison v. Phœnix, 44 Ariz. 66, 33 P. (2d) 927, 93 A.L.R. 354.

A direction that a fund created for the insurance of property of the state and of its political subdivisions be invested as part of a fund in which various public moneys are pooled for investment purposes, in the investment of which a constitutional amendment directs that preference shall be given to long-term loans secured by first mortgages on town and city homes or on cultivated and producing farms in the state, and to bonds issued in the state for educational purposes, does not render the statute violative of a constitutional provision prohibiting the state or its subdivisions from giving or loaning its credit in aid of, or making any donation or grant to, any individual association or corporation, since the constitutional amendment must, in case of conflict with the earlier provisions, prevail. State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581.

A constitutional amendment empowering the legislature to provide from time to time for limiting or otherwise regulating the liability of stockholders has the effect to repeal a previously existing constitutional provision that each stockholder in any corporation, with certain exceptions, shall be liable to the amount of his stock. Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798 (Minnesota).

The November 3, 1908, Amendment of Cal. Const. art. 4, § 26, forbidding the sale of corporate stock on margin or to be delivered at a future day in certain cases, repealed or extinguished all provisions of the former section not re-enacted in the amended section. Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392.

[10] Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798.

[11] Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N. E. 512, Ann. Cas. 1915B, 106.

[12] Ulter v. Moseley, 16 Idaho, 274, 100 P. 1058, 133 Am. St. Rep. 94, 18 Ann. Cas. 723, wherein it was held that since one of two conflicting amendments was not adopted in accordance with the constitutional requirements, and since such amendment was necessarily invalid, due effect should be given to the other amendment where it had in fact been properly adopted.

Annotation: 18 Ann. Cas. 726.

§ 55. Effect Given to Every Part.—An elementary rule of construction is that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous.[13] Fundamental constitutional principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other.[14] Hence, as a general rule, a court should avoid a construction which renders any provision meaningless[15] or inoperative[16] and must lean in favor of a construction which will

[13] Williams v. United States, 289 U. S. 553, 77 L. ed. 1372, 53 S. Ct. 751; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579; Per Trimble, J., Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Wade v. State, 207 Ala. 1, 92 So. 101, citing R. C. L.; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Lamborn v. Bell, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241; State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, citing R. C. L.; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750; People v. Case, 220 Mich. 379, 190 N. W. 289, 27 A.L.R. 686; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; Thompson v. Grand Gulf R. & Bkg. Co. 3 How. (Miss.) 240, 34 Am. Dec. 81; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A. 1916C, 1023, Ann. Cas. 1917C, 926; Oklahoma Cotton Ginners' Asso. v. State, 174 Okla. 243, 51 P. (2d) 327, citing R. C. L.; State ex rel. Cloud v. Election Bd. 169 Okla. 363, 36 P. (2d) 20, 94 A.L.R. 1007; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Finerty v. First Nat. Bank, 92 Okla. 102, 218 P. 859, 32 A.L.R. 1326; Smart v. Craig County, 67 Okla. 141, 169 P. 1101, L.R.A.1918C, 313; Com. ex rel. Boyle v. Wert, 282 Pa. 575, 128 A. 484, citing R. C. L.; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; State v. Gillette (Tex. Com. App.) 10 S. W. (2d) 984, citing R. C. L.; State ex rel. Atkinson v. Evans, 46 Wash. 219, 89 P. 565, 10 L.R.A.(N.S.) 1163; Re Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L.R.A.(N.S.) 1030, Ann. Cas. 1914C, 31; State ex rel. Mays v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L.R.A. (N.S.) 996, Ann. Cas. 1914C, 1.

It cannot be presumed that any clause in the Constitution is intended to be without effect. Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

All parts of a state Constitution are of equal moment and are equally binding upon the courts. Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L.R.A. 157.

Constitutions are supposed to be carefully prepared, and effect should be given to every word if possible. State ex rel. Walker v. Pus, 135 Mo. 325, 36 S. W. 636, 33 L.R.A. 616.

A construction nullifying a specific clause will not be given to a Constitution unless absolutely required by the context. Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

If the plain meaning of an uncontradicted constitutional provision is to be disregarded, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

In the construction of the Constitution real effect must be given to the words it uses. Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21.

[14] Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 S. Ct. 399.

[15] Wade v. State, 207 Ala. 1, 92 So. 101, citing R. C. L.; State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, citing R. C. L.; Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L.R.A. 208, 59 Am. St. Rep. 515; Oklahoma Cotton Ginners' Asso. v. State, 174 Okla. 243, 51 P. (2d) 327, citing R. C. L.; State v. Gillette (Tex. Com. App.) 10 S. W. (2d) 984, citing R. C. L.

Words employed in the Federal Constitution cannot be regarded as meaningless. United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

Effect is to be given to every clause and word of a constitutional provision, and no word is to be treated as unmeaning if a construction can be legitimately found which will preserve it and make it effectual. Denny v. State, 144 Ind. 503, 42 N. E. 929, 31 L.R.A. 726.

It is not to be supposed that a single word was inserted in the organic law of the state without the intention of conveying thereby some meaning. State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79.

[16] Wade v. State, 207 Ala. 1, 92 So. 101, citing R. C. L.; State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771, citing R. C. L.; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; State ex rel. Collins v. Jackson, 119 Miss. 727, 81 So. 1, citing R. C. L.; State v. Gillette (Tex. Com. App.) 10 S. W. (2d) 984, citing R. C. L.

The Constitution is not self-destructive; in other words the powers which it confers on the one hand it does not immediately take away on the other. Hence, the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A. 1917D, 414, Ann. Cas. 1917B, 713; United States v. Billings, 232 U. S. 289, 58 L. ed. 608, 34 S. Ct. 428; Billings v. United States, 232 U. S. 261, 58 L. ed. 596, 34 S. Ct. 421;

render every word operative, rather than one which may make some words idle and nugatory.[17]

The rule is well established that no court is authorized so to construe any clause of the Constitution as to defeat its obvious ends where another construction equally accordant with the words and sense thereof will enforce and protect it.[18] This is exemplified by the doctrine, applied in the construction of the state Constitutions, that where a provision of a state Constitution is capable of two constructions, one of which would be in conflict with the Federal Constitution, the other must be adopted.[19] The general principle has also been employed to the extent of permitting a court, in construing a constitutional amendment, to transpose sentences and sections to aid in arriving at the true construction thereof.[20]

3. Construction as Affected by Implications

§ 56. Generally.—Since Constitutions must of necessity be general rather than detailed and prolix,[1] many of the essentials with which they treat are impliedly controlled or dealt with by them,[2] and implication plays a very important role in constitutional construction. The rule is established beyond cavil that in construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed.[3] The rule is equally applicable to the construction of state Constitutions.[4] The intent of a Constitution may be shown by the implications, as well as by the words of express provisions.[5]

The fact that some degree of implication must be given to words is a proposition of universal adoption; implication is only another term for meaning and intention apparent in the writing on judicial inspection.[6] Thus, a court in construing a provision of the Constitution may imply a negative from affirmative words where the implication promotes, but not where it defeats, the intention.[7]

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 S. Ct. 493; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 S. Ct. 611.

The court cannot assume that the words "within its jurisdiction" in the constitutional provision prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws were inserted without any object; nor is it at liberty to eliminate them from the Constitution and interpret the clause in question as if they were not to be found in that instrument. Blake v. McClung, 172 U. S. 239, 43 L. ed. 432, 19 S. Ct. 165.

[17] Lamborn v. Bell, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; State ex rel. Atkinson v. Evans, 46 Wash. 219, 89 P. 565, 10 L.R.A.(N.S.) 1163.

A Constitution is an instrument of such high and solemn import that every word thereof is to be regarded as though hammered into place. State ex rel. Lewis v. Smith, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18, 63 L.R.A. 116.

[18] Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

[19] Steinhart v. Superior Ct. 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am. St. Rep. 183.

[20] Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

[1] See supra, § 4.

[2] As to the implied powers of Congress under the Federal Constitution, see infra, §§ 172, 173.

[3] Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; The Pesaro, 255 U. S. 216, 65 L. ed. 592, 41 S. Ct. 308; Luria v. United States, 231 U. S. 9, 58 L. ed. 101, 34 S. Ct. 10; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 S. Ct. 242; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152; United States v. Babbit, 1 Black (U. S.) 55, 17 L. ed. 94.

[4] State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272.

[5] State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

[6] Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

[7] Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548.

An exception of foreign vessels from the operation of the provisions of the Eighteenth Amendment to the Federal Constitution when within the territorial waters

The doctrine of construction by implication is limited to the extent of preventing judicial amendment of the fundamental law. Thus, the Supreme Court has declared that a court has no right to insert any clause in the Constitution which is not expressed and cannot be fairly implied.[8]

§ 57. Words of Limitation Showing Extent of Powers.—In construing a Constitution, resort may be had to the well-recognized rule of construction contained in the maxim "expressio unius est exclusio alterius," and the expression of one thing in a Constitution may necessarily involve the exclusion of other things not expressed.[9] The rule has been variously applied. For example, where the means for the exercise of a granted power are given in a Constitution, no other or different means can be implied as being more effectual or convenient,[10] for where a power is expressly given by the Constitution and the mode of its exercise is prescribed, such mode is exclusive[11] of all others.[12] This general rule is subject to the limitation that like all other mere rules of construction applied to ambiguous words, it must yield to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended by the parties was different.[13]

Another important canon of construction of similar nature which is frequently applied to Constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power.[14]

of the United States would tend to embarrass the enforcement of the amendment and defeat the attainment of its obvious purpose and, therefore, cannot reasonably be regarded as implied. Cunard S. S. Co. v. Mellon, 262 U. S. 100, 67 L. ed. 894, 43 S. Ct. 504, 27 A.L.R. 1306.

[8] Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

[9] Ex parte Vallandigham, 1 Wall. (U. S.) 243, 17 L. ed. 589; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770; Election Comrs. v. Knight, 187 Ind. 108, 117 N. E. 565, 659, citing R. C. L. (concurring opinion); Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L.R.A. 726; Morris v. Powell, 125 Ind. 281, 25 N. E. 221, 9 L.R.A. 326; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93; State ex rel. Griffith v. Turner, 117 Kan. 755, 233 P. 510, citing R. C. L.; McKinney v. Barker, 180 Ky. 526, 203 S. W. 303, L.R.A.1918E, 581; Cocke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L.R.A.(N.S.) 415; Henderson v. Koenig, 168 Mo. 356, 68 S. W. 72, 57 L.R.A. 659; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440; Martien v. Porter, 68 Mont. 450, 219 P. 817, citing R. C. L.; State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L.R.A. 791; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Mason v. State, 58 Ohio St. 30, 50 N. E. 6, 41 L.R.A. 291; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Thompson v. Kay, 124 Tex. 252, 77 S. W. (2d) 201, citing R. C. L.; Pace v. Eoff (Tex. Com. App.) 48 S. W. (2d) 956, citing R. C. L.; Collingsworth County v. Allred, 120 Tex. 473, 40 S. W. (2d) 13, citing R. C. L.; Ferguson v. Wilcox, 119 Tex. 280, 28 S. W. (2d) 526, citing R. C. L.; Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799, citing R. C. L.; American Indem. Co. v. Austin, 112 Tex. 239, 246 S. W. 1019, citing R. C. L.; Northern Texas Traction Co. v. Hill (Tex. Civ. App.) 297 S. W. 778, citing R. C. L.; State ex rel. Banker v. Clausen, 142 Wash. 450, 253 P. 805, citing R. C. L.

[10] Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983.

[11] Crabb v. Celeste Independent School Dist. 105 Tex. 194, 146 S. W. 528, 39 L.R.A. (N.S.) 601, Ann. Cas. 1915B, 1146.

[12] People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L.R.A. 726; Morris v. Powell, 125 Ind. 281, 25 N. E. 221, 9 L.R.A. 326; Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754; Sapulpa v. Land, 101 Okla. 22, 223 P. 640, 35 A.L.R. 872; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272.

[13] State ex rel. Griffith v. Turner, 117 Kan. 755, 233 P. 510, citing R. C. L.; Jones v. Hoss, 132 Or. 175, 285 P. 205, citing R. C. L.; Collingsworth County v. Allred, 120 Tex. 473, 40 S. W. (2d) 13, citing R. C. L.; State ex rel. Banker v. Clausen, 142 Wash. 450, 253 P. 805, citing R. C. L.; Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L.R.A.(N.S.) 121, 9 Ann. Cas. 711.

The maxim "expressio unius est exclusio alterius" is not to be applied with the same rigor in construing a state Constitution as a statute, and only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as inhibiting the powers of the legislature. State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153.

[14] Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; People v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770; Postlethwaite v. Edson, 102 Kan. 619, 171 P. 773, L.R.A.1918D, 989; State v. Cunning-

An exception of any particular case presupposes that all those which are not included in such exception are embraced within the terms of a general grant or prohibition. The rule is likewise well established that where no exception is made in terms, none will be made by mere implication or construction.[15] Where a restriction is not general, but is provided in a specific instance, such application of the specific instance will not be carried into other statements which do not provide such limitation.[16] Thus, a constitutional provision forbidding the appointment of a member of the legislature to any civil office under the state cannot be extended to include the mere employment of a legislator by the board of railroad commissioners.[17] A constitutional provision prohibiting the legislature from remitting fines, penalties, and forfeitures "by special law" implies power to remit them by general laws.[18] It has been said in this connection that a power clearly legislative in its character, and not expressly denied to the legislature, ought not to be held denied by implication, unless its exercise will interfere with or defeat the exercise of a power expressly granted.[19] Similarly, the Supreme Court has held that limitations upon a general grant of executive power should not be enlarged beyond the words used.[20]

A specific prohibition does not impliedly limit additional prohibitions if the power to prohibit exists without a grant in the Constitution itself. Thus, where the Constitution prohibits lotteries, the legislature, while it cannot legalize any gambling device which in effect amounts to a lottery, has inherent power to regulate or to prohibit any and all other forms of gambling.[1]

§ 58. Words of Grant Implying Lack of Limitation of Powers.—It is generally understood that grants of power to the Federal Government as contained in the United States Constitution are subject to no limitations except those expressed in the Constitution itself.[2] A power enumerated and delegated by the Constitution to Congress is comprehensive and complete without limitations other than those found in the Constitution.[3]

The question whether powers granted by a state Constitution, in the absence of a particular expressed method of exercising them,[4] are subject to implied limitations by construction seems, as a general rule, to be answered in the negative. In such cases limitations by implication are usually denied, although it is also a well-established rule that inherent legislative powers, as far as the constitutionality of legislation which affects certain rights is concerned, are subject

ham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

15 Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; Morris v. Powell, 125 Ind. 281, 25 N. E. 221, 9 L.R.A. 326; Postlethwaite v. Edson, 102 Kan. 619, 171 P. 773, L.R.A.1918D, 989; Ex parte Massey, 49 Tex. Crim. Rep. 60, 92 S. W. 1086, 122 Am. St. Rep. 784; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L.R.A. 64; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

16 State ex rel. White v. Grant Superior Ct. 202 Ind. 197, 172 N. E. 897, 71 A.L.R. 1354.

17 State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583.

18 Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983.

19 Imperial Irrig. Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322.

As to grants of power not constituting limitations on additional exercise of power, see infra, § 58.

20 Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21.

1 Lee v. Miami, 121 Fla. 93, 163 So. 486, 101 A.L.R. 1115.

2 **Although the Constitution does not in terms extend the judicial power** to all controversies between two or more states, yet it in terms excludes none, whatever may be their nature or subject. It is therefore a question of construction whether the controversy in a given case is within the grant of judicial power. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

3 South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737.

As to the implied powers of the Congress, see infra, §§ 173, 174.

4 See supra, § 57.

to implied limitations in the state Constitutions.[5] The distinction seems to be drawn between the mode of merely exercising powers definitely and specifically granted by the Constitution or the exercise of such granted powers necessary to governmental existence or function on the one hand, and the passage of legislation interfering with private or community rights which seem to be an inherent part of the Anglo-American mode of social intercourse on the other hand. The former two classes of granted powers are not subject to limitation by implication, but the latter, an inherent power, is held to be subject to implied prohibitions in a state Constitution. Thus, with reference to the exercise of specifically granted powers, it has been stated that it is to be presumed that a state Constitution has been carefully made and that every word in it has been carefully chosen to express the intention of the constitutional convention, and especially to express any limitation on a power granted by it, unless expressed in language readily and easily interpreted by any of the citizens under its authority.[6] Therefore, grants of power are liberally construed,[7] and a constitutional grant of an express power without limitation or prescription of the mode of exercise thereof carries with it by implication all means reasonably necessary to effective exercise of the power.[8] In the absence of the limitation already pointed out against inherent legislative power as affecting rights, the answer to the question as to whether implied limitations accompany specific grants of power to the legislature contained in the Constitution, pertaining to functions necessary to the administration of government, is a more or less obvious negative following from the fact that the legislature also possesses all powers not forbidden,[9] since the state Constitution is merely a limitation on its powers.[10] The principle is illustrated excellently by questions which have arisen as to whether there are any implied limitations on the taxing power because certain specific taxing powers are definitely granted by the terms of the Constitution itself. It is generally held that a constitutional provision for the taxation of "property" or other enumerated subjects is not exclusive of the power of the legislature to tax other subjects.[11] Thus, a constitutional grant of power to the legislature to raise revenue by certain specified methods does not interfere with its inherent power to employ other methods for that purpose,[12] and constitutional permission to levy property taxes, license taxes, and per capita taxes does not restrict the power

5 As to implied limitations on the power of the legislature, see infra, § 194.

6 State ex rel. White v. Grant Superior Ct. 202 Ind. 197, 172 N. E. 897, 71 A.L.R. 1354.

7 Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417.

8 Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; State ex rel. Mayo v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L.R.A.(N.S.) 996, Ann. Cas. 1914C, 1.

Where the Constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. Mason v. State, 58 Ohio St. 30, 50 N. E. 6, 41 L.R.A. 291.

9 See infra, § 193.

10 See supra, § 18.

11 Independent School Dist. v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820; Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A. 1915D, 322, Ann. Cas. 1917A, 228; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L.R.A. 588, 86 Am. St. Rep. 306; Mercantile Incorporating Co. v. Junkin, 85 Neb. 561, 123 N. W. 1055, 19 Ann. Cas. 269; State ex rel. Atchinson & N. R. Co. v. Lancaster County, 4 Neb. 537, 19 Am. Rep. 641; Aubol v. Engeseth, 66 N. D. 63, 262 N. W. 338, 100 A.L.R. 853; Eyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L.R.A. (N.S.) 121, 9 Ann. Cas. 711.

Annotation: 100 A.L.R. 860.

North Dakota Const. § 180, providing that "the legislative assembly may provide for the levy, collection, and disposition of an annual poll tax of not more than $1.50 on every male inhabitant in this state over twenty-one and under fifty years of age" does not, by implication, prohibit the legislature from imposing a poll tax on women and on males over fifty years of age. Aubol v. Engeseth, 66 N. D. 63, 262 N. W. 338, 100 A.L.R. 853.

12 Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

of a state legislature to levy an excise tax.[13] The legislative power to fasten duties upon an office, in addition to the duties prescribed by the Constitution, is not limited by implication because the express mentioning in, and conferring by, a constitutional provision, of named powers and duties, without a further provision confining them to those expressly so named, does not create an inhibition upon the legislature from prescribing and annexing other duties appertaining to the same department of government.[14]

Where there is a constitutional command to the legislature to enact certain laws, the question arises whether such a command impliedly prohibits legislation on the subject in other particulars which are not commanded and would otherwise be within the legislative authority. On this question there is a split of authority. Some courts have deemed such a command an implied prohibition on further legislation.[15] In other jurisdictions, however, the position has been taken that the powers of the legislature to deal further with the subject are not curtailed.[16]

The same general principle, negativing the existence of implied limitations on powers conferred by the Constitution, has been applied to the provisions according power to the judiciary. While the state courts receive judicial power by grant in the state Constitution, the whole of such power reposing in the sovereignty is granted to them, except as it may be restricted in the same instrument.[17]

The principle that a grant of powers in a constitutional provision is as a rule unaccompanied by limitation does not apply, however, to a grant in a constitutional provision which amounts to a grant of rights belonging to the state or public to either private persons or public service corporations. Such rights granted are limited to the clear and explicit terms of the grant since they are to be construed most strongly in favor of the public.[18]

4. Principle of Liberality in Construction

§ 59. Generally.—It is a fundamental canon of construction that a Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property.[19] Constitutional provisions should always receive a broader and more liberal construction than statutes,[20] for the power dealt with in the former case is original and unlimited, and in the latter case limited.[1] Consequently, Constitutions are not construed by the same rules as, for instance, criminal statutes.[2] The rule has also been stated that a Constitution is not to be interpreted with the strictness of a private contract.[3]

In construing a Constitution it cannot be carried out with mathematical nicety to logical extremes.[4] Thus, the provisions of the Federal Constitution are not mathematical formulas having their essence in form, but they are organic living institutions transplanted from English soil. Their significance is vital, not formal, and is to be gathered by considering their origin and the line of their growth, not simply by taking the words and a dictionary.[5] The contract clause of the Federal Constitution is not a specific, particularized, absolute, or unqualified prohibition to be read with literal exactness like a mathematical formula, although associated in the same section with more specific prohibitions, but is general, affording a broad outline and requiring construction to fill in the details.[6]

In the consideration of the question of construction, the Supreme Court has also held that the Federal Constitution is to be broadly construed as a document creating a system of government, the provisions of which are designed to make effective and operative all of the governmental powers granted. It is not to be construed technically and narrowly as an indictment or even as a grant presumably against the interest of the grantor, which narrow construction would only permit the passing of such matters as are clearly included within its language.[7] The state courts have likewise decreed that a state Constitution be interpreted so as to carry out the general purposes of the government, and not defeat them.[8]

The Constitution of the United States should not be allowed to become nullified or evaded by astute verbal criticism, without regard to the fundamental aim and object of the instrument and the principles on which it is based,[9] and the

[13] Independent School Dist. v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820.

[14] Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.

[15] Keller v. State (Tex. Crim. Rep.) 87 S. W. 669, 1 L.R.A.(N.S.) 489.
Annotation: 1 L.R.A.(N.S.) 489.

[16] Annotation: 1 L.R.A.(N.S.) 490.

[17] Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105.

[18] Re Russell, 163 Cal. 668, 126 P. 875, Ann. Cas. 1914A, 152, reversed on other grounds in 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A.1918E, 882, Ann. Cas. 1914C, 282.

[19] Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 47 S. Ct. 248; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872; Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Ex parte Ashton, 231 Ala. 497, 165 So. 773, 104 A.L.R. 54; Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359, writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Randle v. Winona Coal Co. 206 Ala. 254, 89 So. 790, 19 A.L.R. 118; Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; State ex rel. Dawson v. Sessions, 84 Kan. 856, 115 P. 641, Ann. Cas. 1912A, 796; State v. Joseph, 143 La. 428, 78 So. 663, L.R.A.1918E, 1062; People ex rel. Moll v. Danziger, 238 Mich. 39, 213 N. W. 448, 52 A.L.R. 136; Sinclair v. State 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; Martien v. Porter, 68 Mont. 450, 219 P. 817, citing R. C. L.; State v. Butterworth, 104 N. J. L. 579, 142 A. 57, 58 A.L.R. 744; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; State v. Nomland, 3 N. D. 427, 57 N. W. 85, 44 Am. St. Rep. 572; State v. Lindway, 131 Ohio St. 166, 2 N. E. (2d) 490 (appeal dismissed in 299 U. S. 506, 81 L. ed. 375, 57 S. Ct. 36), citing R. C. L.; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; Gillespie v. State, 5 Okla. Crim. Rep. 546, 115 P. 620, 35 L.R.A.(N.S.) 1171, Ann. Cas. 1912D, 259; Salter v. State, 2 Okla. Crim. Rep. 464, 102 P. 719, 25 L.R.A.(N.S.) 60, 139 Am. St. Rep. 935; Kirkland v. Allendale County, 128 S. C. 541, 123 S. E. 648, citing R. C. L.; People v. Daniels, 6 Utah, 288, 22 P. 159, 5 L.R.A. 444; State v. Wills, 91 W. Va. 659, 114 S. E. 261, 24 A.L.R. 1398; Re Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L.R.A.(N.S.) 1030, Ann. Cas. 1914C, 31; Allen v. State, 183 Wis. 323, 197 N. W. 808, 39 A.L.R. 782.

[20] Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; Caples v. State, 3 Okla. Crim. Rep. 72, 104 P. 493, 26 L.R.A.(N.S.) 1033.

[1] Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

[2] Re Siegel, 263 Mo. 375, 173 S. W. 1, Ann. Cas. 1917C, 684; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.
The constitutional provision making directors of a corporation personally liable for money misappropriated by its officer renders them sureties, creates a contractual relation, and is therefore not within the rule that penal statutes are to be strictly construed. Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156.

[3] Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122.

[4] Paddell v. New York, 211 U. S. 446, 53 L. ed. 275, 29 S. Ct. 139, 15 Ann. Cas. 187.

[5] Gompers v. United States, 233 U. S. 604, 58 L. ed. 1115, 34 S. Ct. 693, Ann. Cas. 1915D, 1044.

[6] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 393, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481.

[7] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 S. Ct. 655.

[8] Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247.

[9] Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A.(N.S.) 1062, Ann. Cas. 1912A, 487; Smith v. Turner, 7 How. (U. S.) 283, 12 L. ed. 702; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851.
The general principles contained in the Constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory. Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

object of constitutional provisions rather than the form of expression should be regarded.[10] Constitutions are made for practical purposes, and not for the exercise of critical gymnastics. They should be construed so as to carry out the intention of the lawmakers, which should be reasonable rather than absurd.[11]

Another rule for the construction of organic instruments is that whenever the language is not explicit, or admits of doubt, it is presumed that it is intended to be in accordance with the acknowledged principles of justice and liberty.[12] Accordingly, in doubtful cases that particular construction will be preferred which does not violate these fundamental principles,[13] even though, according to some views, this should require a deviation from the strict letter.[14] A constitutional provision should receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment,[15] and the interpretation of constitutional principles must not be too literal.[16] The principles upon which the Federal Constitution was established, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.[17]

The true spirit of constitutional interpretation both as to grants of powers and in respect of prohibitions and limitations is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose;[18] but a case falling within the words of a constitutional provision must also be within its operation, unless there is something in the literal construction so obviously

10 State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio St. 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004.

The prohibitions of the Constitution must be taken largely with a regard to substance, rather than to form, or they are likely to do more harm than good. Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L.R.A. 433, writ of error dismissed in 179 U. S. 405, 45 L. ed. 252, 21 S. Ct. 206.

It is the sole duty of the court in considering a constitutional amendment to ascertain and give effect to the intention of the people in adopting it, and rules which are purely technical should not be permitted to thwart its attainment. Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926.

11 Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A.1915D, 98.

12 Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913E, 960.

13 Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650.

14 Davis v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.

For further discussion of construction of "spirit" and "intention" and their relation to, and effect upon, the words used in the Constitutions, see infra, § 64.

15 State v. Joseph, 143 La. 428, 78 So. 663, L.R.A.1918E, 1062; People ex rel. McClelland v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399.

16 Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438; Phillips Petroleum Co. v. Smith, 177 Okla. 539, 61 P. (2d) 184, 107 A.L.R. 858.

"Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments . . . to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

17 United States v. Lefkowitz, 285 U. S. 452, 76 L. ed. 877, 52 S. Ct. 420, 82 A.L.R. 775.

While it is the rule in Washington that a constitutional provision be given a strict construction, especially where its terms are clear, it is also the rule that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. State ex rel. Willis v. Monfort, 93 Wash. 4, 159 P. 889, L.R.A.1917B, 801; State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 P. 954, 41 L.R.A. (N.S.) 1119.

18 Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648.

The Constitution of the United States is not intended as a facility for crime; it is intended to prevent oppression. Its letter and its spirit are satisfied if, where a criminal purpose is executed, the criminal purpose be punished. Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 S. Ct. 812.

absurd, mischievous, or repugnant to the general spirit of the instrument as to justify an exception.[19] Although the spirit and true meaning of the Federal Constitution will govern in its construction, they must be very apparent to overrule words actually used therein.[20] While constitutional provisions are to be liberally construed in order that legislative enactment may be sustained, the courts cannot permit such provisions to be disregarded or overridden in the enactment of legislation.[21]

In the interpretation of constitutional provisions, it is also true that words are often limited and restrained to a scope and effect somewhat narrower than their literal import on a presumption against an intent to interfere with, or innovate upon, well-established and generally recognized rules and principles of public policy not expressly abolished.[22]

§ 60. Applications of Rule.—The most common examples of the general rule that constitutional provisions which safeguard the personal and civil rights of citizens are to be liberally construed[1] occur in those cases dealing with search and seizure. The Supreme Court has stated on numerous occasions that the provisions of the Fourth Amendment prohibiting unreasonable searches and seizures and legislation regulating the process should be liberally construed in favor of the individual.[2] The rule has also been applied in the interpretation of those constitutional provisions forbidding cruel and unusual punishment,[3] protecting one from self-crimination in a criminal case,[4] and forbidding imprisonment for debt.[5] The principle has also been extended to matters dealing with the protection of fundamental political rights, for the constitutional guaranty of the right of assembly must be given the most liberal and comprehensive construction.[6] The rule relates to protection of the property rights of the citizen in different ways. For example, the constitutional provision allowing the exercise of eminent domain should be liberally construed in favor of the private property owner.[7] Similarly, constitutional provisions relating to homestead exemptions are liberally construed in the interest of the family home.[8]

The general rule as to liberal construction has been applied to questions of

19 Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

20 Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

Although affirmative words may, in their operation, negative objects other than those affirmed and such effect must be given them where otherwise they are inoperative, where they may be given operation, without such effect, and to construe them as such a negation would destroy some of the most important objects for which the power in regard to which such words are used was created, no such effect will be given them. Ibid.

21 Galpin v. Chicago, 269 Ill. 27, 109 N. E. 713, L.R.A.1917B, 176.

22 Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L.R.A. 788; State v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L.R.A.(N.S.) 996.

1 See supra, § 59.

2 Sgro v. United States, 287 U. S. 206, 77 L. ed. 260, 53 S. Ct. 138, 85 A.L.R. 108; Grau v. United States, 287 U. S. 124, 77 L. ed. 212, 53 S. Ct. 38; United States v. Lefkowitz, 285 U. S. 452, 76 L. ed. 377, 52 S. Ct. 420, 82 A.L.R. 775; Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 51 S. Ct. 153; Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 47 S. Ct. 248; Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 S. Ct. 261; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524.

Constitutional limitations upon search and seizure are treated fully in SEARCH AND SEIZURE [Also 24 R. C. L. p. 702, §§ 4 et seq.].

3 Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241.

4 Powell v. Com. 167 Va. 558, 189 S. E. 433, 110 A.L.R. 90.

5 See infra, § 327.

6 State v. Butterworth, 104 N. J. L. 579, 142 A. 57, 58 A.L.R. 744.

As to a general discussion of this right, see infra, § 325.

7 King County v. Seattle Cedar Lumber Mfg. Co. (King County v. Annand) 94 Wash. 84, 162 P. 27, L.R.A.1917C, 1184.

As to the construction of constitutional provisions relating to the taking of private property for public purpose, see EMINENT DOMAIN [Also 10 R. C. L. p. 15, § 13, p. 18, § 15].

8 Hill v. First Nat. Bank, 79 Fla. 391, 84 So. 190, 20 A.L.R. 270.

For general discussion of construction of laws relating to homesteads, see HOMESTEAD [Also 13 R. C. L. p. 547, § 8].

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a procedural aspect. Thus, a remedial power in the Federal [9] or state Constitution should be liberally construed,[10] although it imposes an obligation which does not attach at common law. The court should inquire simply as to its intent.[11]

The principle likewise extends to matters connected with the form of legislation. The constitutional provision requiring that the subject of a bill be clearly expressed in its title must be liberally construed.[12]

In various matters relating to the departments of government, the exercise of their powers, and governmental functions generally, the rule of liberal construction has been applied. Thus, a constitutional amendment which aims to enlarge the power of the legislature or to remove doubts concerning its power should not be given too strict and literal an interpretation.[13] A constitutional provision against giving or loaning the state's credit should be construed liberally to effect its purpose,[14] as must a constitutional provision that no tax shall be levied on one community or taxing district for the exclusive benefit of another,[15] as well as a constitutional prohibition of extra compensation for work done on public contracts, in order to promote the policy behind it.[16] The provisions of the Federal Constitution for intrastate extradition should receive a liberal construction to carry out their manifest purpose to effect the return of those charged with crime.[17]

B. Intent of Framers and Adopters

1. In General

§ 61. Generally.—The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it.[18] A constitutional clause must be construed reasonably to carry out the intention of the framers,[19] which gives rise to the corollary that it should not be construed so as to defeat the obvious intent if another construc-

9 Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

10 Tidewater R. Co. v. Shartzer, 107 Va. 562, 59 S. E. 407, 17 L.R.A.(N.S.) 1053.

11 Rider v. Fritchey, 49 Ohio St. 285, 30 N. E. 692, 15 L.R.A. 513.

12 Galpin v. Chicago, 269 Ill. 27, 109 N. E. 713, L.R.A.1917B, 176; State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L.R.A. 846.

For detailed discussion of constitutional provisions requiring the subject of a bill to be clearly expressed in the title, see Statutes [Also 25 R. C. L. p. 837, § 85].

13 Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390.

14 Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1515.

15 Thomson v. Harnett County, 209 N. C. 662, 184 S. E. 490, 106 A.L.R. 602.

16 McGovern v. New York, 234 N. Y. 377, 138 N. E. 26, 25 A.L.R. 1442.

17 State ex rel. Shapiro v. Wall, 187 Minn. 246, 244 N. W. 811, 85 A.L.R. 114; State ex rel. Lea v. Brown, 166 Tenn. 669, 64 S. W. (2d) 841, 91 A.L.R. 1246.

For a detailed discussion of the question, see Extradition [Also 11 R. C. L. p. 711, § 2].

18 Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 S. Ct. 477; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A.1915D, 98; Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67; Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 1 L.R.A. 437, 8 Am. St. Rep. 386; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077; State ex rel. Putnam v. Holm, 172 Minn. 162, 215 N. W. 200, 54 A.L.R. 333; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Hope, 100 Mo. 347, 13 S. W. 490, 8 L.R.A. 608; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114; State v. Ligarden, 59 N. D. 475, 230 N. W. 729, 70 A.L.R. 126; Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191; Krens v. Brady, 37 Okla. 754, 133 P. 216, 47 L.R.A.(N.S.) 106; Keetch v. Cordner, — Utah, —, 62 P. (2d) 273, 108 A.L.R. 52; State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 P. 954, 41 L.R.A.(N.S.) 1119; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

The primary principle underlying an interpretation of Constitutions is that the intent is the vital part and the essence of the law. Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

19 Woodson v. Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716.

tion equally in accordance with the words and sense may be adopted which will enforce and carry out the intent.[20] The intent must be gathered from both the letter and spirit of the document.[1]

It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters.[2]

Wherever the purpose of the framers of a Constitution is clearly expressed, it will be followed by the courts.[3] Even where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption,[4] because in construing a constitutional provision, its general scope and object should be considered.[5]

2. Purpose

§ 62. Old Law, Mischief, and Remedy.—The familiar rule, as to the interpretation of changes in statutory law, that an inquiry should be directed to the old law, the mischief, and the remedy [6] has frequently been applied in the interpretation of constitutional provisions.[7] Constitutions are to be construed in the light of their purpose [8] and should be given a practical interpretation so that the plainly manifested purpose of those who created them may be carried out.[9] In other words, a constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it is aimed.[10]

20 Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

The court in construing the language of the Constitution should place itself as nearly as possible in the condition of the men who framed the instrument. Ex parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781.

1 State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153.

2 Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

3 Keller v. State (Tex. Crim. Rep.) 87 S. W. 669, 1 L.R.A.(N.S.) 489.

4 Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750.

Where language used in a Constitution is capable of two constructions, it must be so construed as to carry into effect the purpose of the constitutional convention. Ratliff v. Beale, 74 Miss. 247, 20 So. 865, 34 L.R.A. 472.

5 Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800.

As to the construction as based on the purpose of the provision, see infra, §§ 62, 63.

6 See Statutes [Also 25 R. C. L. p. 1015, § 254].

7 Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502; Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42; Ratliff v. Beale, 74 Miss. 247, 20 So. 865, 34 L.R.A. 472; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S. W. (2d) 482, citing R. C. L.; Travelers Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Smith v. St. Paul, M. & M. R. Co. 39 Wash. 355, 81 P. 840, 70 L.R.A. 1018, 109 Am. St. Rep. 889.

The conditions which occasioned the adoption of a constitutional amendment requiring the authority of a majority of the electors of the state for the issuance of bonds pledging the credit of the state or any of its revenues may properly be taken into consideration in interpreting the meaning of the language of the amendment. Davis v. Phipps, 191 Ark. 298, 85 S. W. (2d) 1020, 100 A.L.R. 1110.

8 Kerby v. Luhrs, 44 Ariz. 208, 36 P. (2d) 549, 94 A.L.R. 1502; Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

9 Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.

10 Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; Swanson v. Ottumwa, 118 Iowa, 161, 91 N. W. 1048, 59 L.R.A. 620; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; State ex rel. Board of Education v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481, 44 L.R.A. 252, writ of error dismissed in 173 U. S. 461, 43 L. ed. 768, 19 S. Ct. 464; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; State v. Tollefson, 142 Or. 192, 16 P. (2d) 625, citing R. C. L.; Ft. Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S. W. (2d) 397, citing R. C. L.; State ex rel. Mays v.

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Frequently, the clue to the real meaning of an ambiguous provision in a Constitution may be found by reference to the corresponding provisions of the previously existing Constitution,[11] and it is undoubtedly true that a constitutional provision is frequently better understood by a knowledge of the evils which led to its adoption.[12]

Many times the objects of a constitutional provision are expressed in the instrument itself, and a statement of such objects may be given great weight in its interpretation.[13]

This general principle of interpretation of Constitutions has an important application in investigating the nature and extent of powers. In investigating the nature and extent of the powers conferred by the Federal Constitution on Congress, it is indispensable to keep in view the objects for which those powers were granted, and resort may be had to the universal rule of construction which applies alike to statutes, wills, contracts, and Constitutions.[14] In order to obtain a just interpretation of constitutional provisions bearing on or affecting the fundamental guaranties of liberty, reference should be made to the historical causes to which they owe their origin and the mischiefs which they were intended to remedy.[15]

In certain instances, in order to ascertain the mischief designed to be remedied or the purpose to be accomplished by a change in the Constitution, it is permissible to examine the proceedings of the convention which drafted the provisions in question.[16]

§ 63. Existing Conditions and History.—It is settled by very high authority that in placing a construction on a Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy.[17] A constitutional provision must

Brown, 71 W. Va. 519, 77 S. E. 243, 45 L.R.A.(N.S.) 996.

11 Williams v. Castleman, 112 Tex. 193, 247 S. W. 263, citing R. C. L.; Newport News v. Woodward, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625.

12 Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Davis v. Phipps, 191 Ark. 298, 85 S. W. (2d) 1020, 100 A.L.R. 1110.

In construing the constitutional provision against statutes impairing the obligation of contracts the court considered the current abuses of legislative power, the intent of the framers of the instrument, and its general spirit. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

13 Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

14 Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Re Russell, 163 Cal. 668, 126 P. 875, Ann. Cas. 1914A, 152, reversed on another point in 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A.1918E, 882, Ann. Cas. 1914C, 1282.

The Constitution and laws of the United States are construed like other instruments granting power or property. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

15 Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L.R.A. 33.

16 Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567; Williams v. Castleman, 112 Tex. 193, 247 S. W. 263, citing R. C. L.

As to the general question of the effect of discussions in convention on the construction of constitutional provisions, see infra, § 84.

17 Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A.1917D, 414, Ann. Cas. 1917B, 713; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; Stauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; Huxtable v. State, 181 Ark. 533, 26 S. W. (2d) 577, citing R. C. L.; Lybrand v. Wafford, 174 Ark. 298, 296 S. W. 729, citing R. C. L.; Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Re Russell, 163 Cal. 668, 126 P. 875, Ann. Cas. 1914A, 152, reversed on other grounds in 233 U. S. 195, 58 L. ed. 912, 34 S. Ct. 517, L.R.A.1918E, 882, Ann. Cas. 1914C, 1282; Ex parte Pricha, 70 Fla. 265, 70 So. 406, citing R. C. L. (concurring opinion); Codd v. McGoldrick Lumber Co. 48 Idaho, 1, 279 P. 298, 67 A.L.R. 580; Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42; State

be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them.[18] Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption,[19] the general spirit of the times, and the prevailing sentiments among the people.[20] Reference may be made to the historical facts relating to the original or political institutions of the community[1] or to prior

v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; Detroit v. Chapin, 108 Mich. 136, 66 N. W. 587, 37 L.R.A. 391; State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S. W. (2d) 131, citing R. C. L.; State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; Re Ming, 42 Nev. 472, 181 P. 319, 6 A.L.R. 1216; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L. (concurring opinion); Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Kirkland v. Allendale County, 128 S. C. 541, 123 S. E. 648, citing R. C. L.; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Grasso v. Cannon Ball Motor Freight Lines, 125 Tex. 154, 81 S. W. (2d) 482, citing R. C. L.; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28, Ann. Cas. 1916B, 810; State ex rel. Zimmerman v. Dammann, 201 Wis. 84, 228 N. W. 593, citing R. C. L.

The safest rule in the interpretation of the Constitution is to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporaneous history, and to give to each word just such force, consistent with its legitimate meaning, as may fairly secure and attain the ends proposed. Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

In placing a construction upon a written Constitution or any clause or part thereof, the court should look to the nature and objects of the particular powers, duties, and rights in question, with all the aids and lights of contemporary history. Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181.

The Federal Supreme Court, when called upon to construe and apply a provision of the Constitution of the United States, must look, not merely to its language, but to its historical origin, and to those decisions of the court in which its meaning and the scope of its operation have received deliberate consideration. Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 S. Ct. 331.

The mischief to be prevented, as disclosed in the history of the country, has been considered by the court in the construction of the constitutional provision against the emission of bills of credit by the states. Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903.

Every Constitution is to be interpreted in the light of its own history. Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332.

18 Bank of Newport v. Cook, 60 Ark. 288, 30 S. W. 35, 29 L.R.A. 761, 46 Am. St. Rep. 171.

Courts are bound to presume that people adopting a Constitution are familiar with the previous and existing laws upon the subjects to which its provisions relate and upon which they express their judgment and opinion in its adoption. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191.

In the application of any constitutional provision, it is always important to inquire what was the state of the law at the time such provision became a part thereof. State v. Kees, 92 W. Va. 277, 114 S. E. 617, 27 A.L.R. 681.

19 Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98; Huxtable v. State, 181 Ark. 533, 26 S. W. (2d) 577, citing R. C. L.; Lybrand v. Wafford, 174 Ark. 298, 296 S. W. 729, citing R. C. L.; Ex parte Pricha, 70 Fla. 265, 70 So. 406, citing R. C. L. (concurring opinion); Codd v. McGoldrick Lumber Co. 48 Idaho, 1, 279 P. 298, 67 A.L.R. 580; State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Com. v. Kentucky Jockey Club, 238 Ky. 739, 38 S. W. (2d) 987, citing R. C. L.; State ex rel. Childs v. Copeland, 66 Minn. 315, 69 N. W. 27, 34 L.R.A. 777, 61 Am. St. Rep. 410; Re Button, 83 Neb. 636, 120 N. W. 203, 23 L.R.A.(N.S.) 1173; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.; State v. Kees, 92 W. Va. 277, 114 S. E. 617, 27 A.L.R. 681.

"Every Constitution has a history of its own which is likely to be more or less peculiar; and unless it is interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people agreeing to it." Per Cooley, Ch. J., in People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95, 53 Mich. 481, 19 N. W. 155.

20 Mattox v. United States, 156 U. S. 237, 39 L. ed. 409, 15 S. Ct. 337; Huxtable v. State, 181 Ark. 533, 26 S. W. (2d) 577, citing R. C. L.; Lybrand v. Wafford, 174 Ark. 298, 296 S. W. 729, citing R. C. L.; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332; Bradford Constr. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L.R.A.(N.S.) 1040, 8 Ann. Cas. 1077; Jones v. Hoss, 132 Or. 175, 285 P. 205, citing R. C. L.; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.

The Fourth Amendment to the Federal Constitution is to be construed in the light of what was deemed to be an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as interests and rights of individual citizens. Carroll v. United States, 267 U. S. 132, 69 L. ed. 543, 45 S. Ct. 280, 39 A.L.R. 790.

1 Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98; Bank of Newport v. Cook, 60 Ark. 288, 30 S. W. 35, 29 L.R.A. 761, 46 Am. St. Rep. 171.

Provisions of a state Constitution with reference to the exercise of the power of eminent domain must be interpreted in

well-known practices and usages.[2] It is proper to consider the information which the framers presumably possessed respecting the laws of England and of the other states of the Union.[3] In the application of these principles, it has been held that a written Constitution, in those matters affecting municipalities, should be construed in the light of the right of municipal self-government.[4]

Construction based on custom, usage, or the conclusions of the courts must be properly subordinated to the time factor of the creation of the Constitution itself, and later usages cannot override a patent intention expressed at an earlier date. Thus, neither statutes enacted nor judicial opinions rendered since the adoption of a Constitution can impute a different meaning to it than that obviously intended at the time the Constitution was adopted.[5]

Historical matters totally unconnected with subjects with which the Constitution deals are of insignificant import in construing it. Legislative practices of the period immediately succeeding the Revolution have very little weight upon the issue of constitutional limitations upon legislative power. They are of value solely as evidence of the state of mind of their creators.[6]

3. Meaning of Language

§ 64. Generally.—It is a general principle that the intention to which force is to be given is that which is embodied and expressed in the constitutional provisions themselves;[7] for words are the common signs that mankind make use of to declare their intention to one another. When the words of a man express his meaning plainly, distinctly, and perfectly, there is no occasion to have recourse to any other means of interpretation.[8] The court, therefore, in construing a constitutional enactment, is usually said to be limited to the language of the enactment itself. It may not be governed by what the framers of the amendment might have meant to say, but is of necessity controlled by what they did say.[9] The rule is sometimes stated more completely that a constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads.[10] In such a case no construction is permissible [11] and

the light of their historical background. Codd v. McGoldrick Lumber Co. 48 Idaho, 1, 279 P. 298, 67 A.L.R. 580.

[2] Shean v. Cook, 180 Cal. 92, 179 P. 185, 3 A.L.R. 1042; Codd v. McGoldrick Lumber Co. 48 Idaho, 1, 279 P. 298, 67 A.L.R. 580; Johnston v. State, 128 Ind. 16, 27 N. E. 422, 12 L.R.A. 235, 25 Am. St. Rep. 412; De Camp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

Established usage may be a part of a state Constitution. Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

[3] State v. Brown, 103 Vt. 312, 154 A. 579, 76 A.L.R. 1029.

[4] State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222.

As to local self-government generally, see supra, § 16.

[5] Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.

[6] Eyers Woolen Co. v. Gilsum, 84 N. H. 1, 146 A. 511, 64 A.L.R. 1196.

[7] Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 66 L. ed. 818, 42 S. Ct. 449, 21 A.L.R. 1432; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; People v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; People v. Stevenson, 281 Ill. 17, 117 N. E. 747, citing R. C. L.; Re Ming, 42 Nev. 472, 181 P. 319, 6 A.L.R. 1216; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio St. 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

[8] Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; Sandelin v. Collins, 1 Cal. (2d) 147, 33 P. (2d) 1009, 93 A.L.R. 956.

The courts must give effect to constitutional provisions according to their language and obvious intent. Utah Builders' Supply Co. v. Gardner, 86 Utah, 250, 39 P. (2d) 327, 103 A.L.R. 928.

[9] Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A. (N.S.) 652, Ann. Cas. 1915C, 822.

[10] Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L.R.A.(N.S.) 415.

[11] State ex rel. Summerfield v. Clarke, 21 Nev. 333, 31 P. 545, 18 L.R.A. 313, 37 Am. St. Rep. 517; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

The court has neither right nor authority

there is no excuse for interpolation or addition.[12] In other words the courts are not at liberty to search for its meaning beyond the instrument,[13] nor are they at liberty, by a resort to the refinements of legal learning, to restrict an obvious meaning.[14] Language which is plain and easily understood should be looked to without extrinsic aid for the meaning intended.[15] As otherwise stated, that which the words of a constitutional provision declare is its meaning cannot be added to, or taken away from, by the court or legislature.[16]

In construing the meaning of a particular word, resort may be had to other sections of the same instrument for the sense in which the word is used, since a word repeatedly used in a Constitution will generally be given the same meaning throughout the instrument whether such meaning is technical or popular in its character.[17] This principle is subject to the obvious limitation that the same words may not necessarily have the same meaning attached to them where found in different parts of the same instrument, since their meaning is actually controlled by the context.[18] Another established principle concerning the use of words is to the effect that in expounding the Federal Constitution, the omission in one place of an adjective used in others cannot be regarded as accidental, under the rule that in expounding the Constitution every word must have its due force and appropriate meaning.[19]

There seems to be a conflict in theory, although no mention of it is made in the cases themselves, between those cases which state that in order to arrive at the intent of the adopters of the Constitution and to give effect to its true spirit and purpose,[20] the court will look back of the literal meaning of the language not only to ascertain the intention, but to give effect to it, and those cases which have been discussed in the foregoing paragraphs of this section which state that where the language is unambiguous, no construction is possible and no intent can be derived other than that which may be derived from the meaning of the language itself. The place where the one rule ceases to operate and the other starts is not clearly marked out by the decisions, although an examination of them discloses that in many of the cases which adopt the

to assume to interpret or construe a constitutional provision where there is no doubt, ambiguity, or uncertainty as to the meaning of the language employed by the Constitution makers. State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L.R.A.1915A, 256.

[12] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Sandelin v. Collins, 1 Cal. (2d) 147, 33 P. (2d) 1009, 93 A.L.R. 956.

[13] Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651.

[14] State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111.

Where the words of a Constitution are unambiguous and, in their commonly received sense, lead to a reasonable conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction, for the purpose of limiting or extending its operation. State ex rel. Torryson v. Grey, 21 Nev. 378, 32 P. 190, 19 L.R.A. 134.

[15] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Laird v. Sims, 16 Ariz. 521, 147 P. 738, L.R.A.1915F, 519.

While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words; and neither practice nor extrinsic circumstances can control its clear language. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

[16] State ex rel. Childs v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459.

[17] Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67; State v. Gillette (Tex. Com. App.) 10 S. W. (2d) 984, citing R. C. L.

A word which has been plainly used in a limited sense in articles of the Constitution relating to the legislative and executive departments must be understood as retaining the same sense when employed in an article relating to the judicial department. Henburn v. Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332.

As to the meaning of words generally, see infra, § 65.

[18] Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25.

[19] Williams v. United States, 289 U. S. 553, 77 L. ed. 1372, 53 S. Ct. 751.

[20] See supra, § 59.

principle of looking back of the language to arrive at the spirit of the adopters, personal and civil rights of individuals, in the protection of which the courts have always been very zealous, are involved. As a result of this apparent inconsistency, a slightly different rule seems, therefore, to be adopted in a few jurisdictions with reference to the question of construing the language of constitutional provisions. Basing its conclusions on the fact that the construction of constitutional provisions is directly analogous to the construction of statutes and further maintaining that in order to arrive at and carry out the intention of the framers an extremely liberal construction should be employed—although it seems that it may be carried to the extent of altering the meaning of words—one court has stated that to give effect to the intention expressed in constitutional provisions when such an intention can be deduced therefrom, words may be modified, altered, or supplied so as to obviate any repugnancy to, or inconsistency with, such an intention, although in so doing particular provisions may not be read or construed according to their literal meaning.[1]

§ 65. Ordinary Meaning of Words.—Even though the language may seem to be clear in its meaning, many questions arise where a word which would otherwise be unambiguous has two or more separate and distinct meanings or connotations. In such a situation a question of construction exists, for it must be determined which of the possible meanings of the term is intended. Words or terms used in a Constitution, being dependent on ratification by the people voting upon it, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature.[2] This gives rise to

[1] Clark v. Boyce, 20 Ariz. 544, 185 P. 136, citing R. C. L.

In Clark v. Boyce, 20 Ariz. 544, 185 P. 136, citing R. C. L., the court cites as authorities for its position cases which deal with the construction of statutes rather than of constitutional provisions. If the court means that in order to give effect to true intention, the spirit of the provisions rather than the letter of them should be looked to, the case is in accord with the general principle of liberal construction stated supra, § 59. If the court means that it can search for an intention in spite of plain and unambiguous words and change the meaning of those words, the holding seems in effect to violate the principle that the intention is to be gathered from the words of the provision when those words are plain. There seems to be a distinction—perhaps these two theories can be reconciled—between (1) broadly looking at the spirit of the Constitution to carry out a purpose which is held to be paramount, although not expressed by the language actually employed, hence, postulating an intent in spite of clear language, and (2) not postulating any intent where language is clear and unambiguous. The line of demarcation, however, is not pointed out in the decisions.

[2] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Pocket Veto Cases (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; Vahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 4 L.R.A. 462, 14 Am. St. Rep. 73; Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67; People v. Stevenson, 281 Ill. 17, 117 N. E. 747, citing R. C. L.; Bishop v. State, 149 Ind. 223, 48 N. E. 1038, 39 L.R.A. 278, 63 Am. St. Rep. 279; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; McKinney v. Barker, 180 Ky. 526, 203 S. W. 303, L.R.A. 1918E, 581; Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L.R.A.(N.S.) 415; State ex rel. Hinz v. Moody, 71 Mont. 473, 230 P. 575, citing R. C. L.; State v. Gerry, 68 N. H. 495, 38 A. 272, 38 L.R.A. 228; Atty. Gen. v. Taggart, 66 N. H. 362, 29 A. 1027, 25 L.R.A. 613; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Borrowdale v. Socorro, 23 N. M. 1, 163 P. 721, L.R.A.1917E, 456; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Tulsa v. McIntosh, 141 Okla. 220, 284 P. 875, citing R. C. L.; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; Ball v. Davis, 118 Tex. 534, 18 S. W. (2d) 1063, citing R. C. L.; Tintic Standard Min. Co. v. Utah County, 80 Utah, 491, 15 P. (2d) 633, citing R. C. L.; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.; B. F. Sturtevant Co. v. Industrial Commission, 186 Wis. 10, 202 N. W. 324, citing R. C. L.

The words of the Constitution should be given the meaning they were intended to bear when that instrument was framed and adopted. Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691.

The Constitution is not to be construed in a technical manner, but in ascertaining its meaning, the courts are to consider the

the universally recognized and incontrovertibly established rule of construction that it is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual signification and import.[3]

In framing a Constitution words are employed in a comprehensive sense as expressive of general ideas rather than of finer shades of thought or of narrow distinctions,[4] and ordinarily words in an instrument like the United States Constitution do not have a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies.[5] Thus, the words expressing the various grants in the Federal Constitution are words of general import and are to be construed as such and as granting to the full extent the powers named.[6] The words of the Constitution, however, are to be taken in their natural and obvious sense, and not in a sense unreasonably

circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it. Bonsal v. Yellott, 100 Md. 481, 60 A. 593, 69 L.R.A. 914.

Language used in a Constitution must be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. Ohio ex rel. Popovice v. Agler, 280 U. S. 379, 74 L. ed. 489, 50 S. Ct. 154.

[3] United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Pocket Veto Case (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21; Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 66 L. ed. 818, 42 S. Ct. 449, 21 A.L.R. 1432; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Tennessee v. Whitworth, 117 U. S. 139, 29 L. ed. 833, 6 S. Ct. 649; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153; Turlock Irrigation Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425; San Pedro, L. A. & S. L. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L.R.A.(N.S.) 686; Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67; Powell v. Spackman, 7 Idaho, 692, 65 P. 503, 54 L.R.A. 378; People ex rel. Watseka Teleph. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; People v. Stevenson, 281 Ill. 17, 117 N. E. 747, citing R. C. L.; Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; State ex rel. Putnam v. Holm, 172 Minn. 162, 215 N. W. 200, 54 A.L.R. 333; O'Brien v. State, 125 Ind. 38, 25 N. E. 137, 9 L.R.A. 323; State ex rel. Dawson v. Sessions, 84 Kan. 856, 115 P. 641, Ann. Cas. 1912A, 796; Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, L.R.A.1916B, 931, Ann. Cas. 1917B. 474; State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459; State v. Mobile, J. & K. C. R. Co. 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L.R.A. 33; Saleno v. Neosho, 127 Mo. 627, 30 S. W. 190, 27 L.R.A. 769, 48 Am. St. Rep. 653; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Ex parte Ming, 42 Nev. 472, 181 P. 319, 6 A.L.R. 1216; State v. Clarke, 21 Nev. 333, 31 P. 545, 18 L.R.A. 313, 37 Am. St. Rep. 517; Borrowdale v. Socorro, 23 N. M. 1, 163 P. 721, L.R.A.1917E, 456; Re Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L.R.A. 781; Dixon v. Shaw, 122 Okla. 211, 253 P. 500, 50 A.L.R. 1232; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Lesser v. Warren, 237 Pa. 501, 85 A. 839, 43 L.R.A.(N.S.) 839; Philadelphia v. Masonic Home, 160 Pa. 572, 28 A. 954, 23 L.R.A. 545, 40 Am. St. Rep. 736; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L.R.A. 725, overruled on another point in Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469, 3 L.R.A.(N.S.) 837, 5 Ann. Cas. 881; Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A. (N.S.) 404; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D. 833; State ex rel. Atkinson v. Evans, 46 Wash. 219, 89 P. 565, 10 L.R.A.(N.S.) 1163; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.; B. F. Sturtevant Co. v. Industrial Commission, 186 Wis. 10, 202 N. W. 324, citing R. C. L.; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L.R.A. 515, 48 Am. St. Rep. 928; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

The interpretation that should be given the Constitution is that which reasonable minds, the great mass of the people themselves, would give it. Veto Case, 69 Mont. 325, 222 P. 428, 35 A.L.R. 592.

[4] Com. v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A.L.R. 1568.

[5] Re Strauss, 197 U. S. 324, 49 L. ed. 774, 25 S. Ct. 535.

[6] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648.

Words in a constitutional provision, which are employed to confer a power on the legislature to borrow money, in order to provide for the safety and general welfare of the people, are not to receive that limited and restricted interpretation and meaning which they would have in an authority conferred by law or by contract upon trustees. Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122.

restricted or enlarged,[7] for in construing a constitutional provision the courts have no more right to broaden the meaning of words used than to restrict or limit such meaning.[8] Nevertheless, it must be taken as established that where words are used which have both a restricted and a general meaning, the general must prevail over the restricted unless the nature of the subject matter of the context clearly indicates that the limited sense is intended.[9]

No forced, unnatural,[10] narrow, or technical construction should ever be placed upon the language of a Constitution. Nor should the judiciary indulge in or follow any ingenious refinements or subtlety of reasoning as to the meaning of its provisions.[11] The courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent.[12] A statutory provision that words and phrases shall be construed according to the common and apparent usage of the language, but technical words and phrases and such others as may acquire a peculiar and appropriate meaning in law shall be construed and understood according to such peculiar and appropriate meaning, has no more weight in the construction of constitutional language than in the interpretation of a will.[13]

The general rule does not apply to technical words and phrases which necessarily should be given a technical significance.[14]

In any event it must be presumed that the Constitution has been drafted with the utmost care and precision in the use of language and with a full understanding of the accepted meaning of every word used in it.[15]

[7] Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

The Sixteenth Amendment to the Federal Constitution, providing for an income tax, is to be taken as written, and is not to be extended beyond the meaning clearly indicated by the language used. Edwards v. Cuba R. Co. 268 U. S. 628, 69 L. ed. 1124, 45 S. Ct. 614.

[8] Borrowdale v. Socorro, 23 N. M. 1, 163 P. 721, L.R.A.1917E, 456.

[9] Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833.

[10] Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; Worth v. Norton, 56 S. C. 56, 33 S. E. 792, 45 L.R.A. 563, 76 Am. St. Rep. 624.

[11] Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381.

Such interpretation will be given to a constitutional provision as will promote the object of the people in adopting it, when such object is clearly indicated in the context, and to this end narrow and technical definitions of particular words will be disregarded. Hupp v. Hock-Hocking Oil & Natural Gas Co. 88 Ohio St. 61, 101 N. E. 1053, Ann. Cas. 1914D, 1004.

A construction which requires for its demonstration a labored process of occult reasoning upon the meaning of words and phrases so different from the apparent meaning as to warrant the belief that it never occurred to the framers of the instrument or the people who adopted it should be rejected even if it could be shown to be in accordance with the strict grammar of the language and meaning of the words employed. State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

[12] McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; People v. Stevenson, 281 Ill. 17, 117 N. E. 747, citing R. C. L.; State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459; State ex rel. Kendall v. Cole, 38 Nev. 215, 148 P. 551, citing R. C. L. (concurring opinion); O'Connor v. Armstrong, 299 Pa. 390, 149 A. 655, citing R. C. L.; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833; Payne v. Racine, 217 Wis. 550, 259 N. W. 437, citing R. C. L.; B. F. Sturtevant Co. v. Industrial Commission, 186 Wis. 10, 202 N. W. 324, citing R. C. L.

In refusing to give a particular meaning to the Constitution the courts frequently allude to the fact that the meaning in question could have easily been plainly expressed if it had been intended. People ex rel. Watseka Teleph. & Teleg. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636.

For detailed discussion of relative weight given to "spirit" of the Constitution and to unambiguous meaning of terms as relating to the question of intent, and to the extent to which the courts may go in interpreting such words, see supra, § 64.

[13] Williams v. State, 81 N. H. 341, 125 A. 661, 39 A.L.R. 490.

[14] Kreps v. Brady, 37 Okla. 754, 133 P. 216, 47 L.R.A.(N.S.) 106.

A Constitution is to be construed so as to give effect to the intention of the people who adopted it, and this intention is to be sought in the Constitution itself and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction. Ibid.

For general discussion, see infra, § 66.

[15] McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E, 858, Ann. Cas. 1917A, 1046.

§ 66. Technical Words and Common-law Phrases.—Certain expressions which appear in Constitutions, such as "ex post facto laws," are obviously technical; and where such words have been in use prior to the adoption of a Constitution, it is presumed that its framers and the people who ratified it have used such expressions in accordance with their technical meaning.[16] The words "criminal charge,"[17] "jury," and "trial by jury" also may be mentioned as illustrations of words which should be construed in their proper technical sense in Constitutions unless a contrary intention clearly appears.[18]

An important canon of construction is that Constitutions must be construed with reference to common law,[19] and although there is no common law of the United States in the sense of a national customary law, as distinguished from the common law of England adopted by the several states,[20] in interpreting the Federal Constitution recourse may still be had to the aid of the common law of England.[1] It has been said that without reference to this common law the language of the Federal Constitution could not be understood.[2] This is due to the fact that this instrument and the plan of government of the United States were founded on the common law as established in England at the time of the Revolution.[3]

Whether a clause in the Constitution is to be restricted by the rules of the English law as they existed when the Constitution was adopted depends upon the terms or the nature of the particular clause in question.[4] It is a general

[16] Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

It is a fundamental rule that in construing Constitutions, terms employed therein shall be given the meaning which had been put upon them and which they possessed at the time of the framing and adoption of the instrument. If a word has acquired a fixed, technical meaning in legal and constitutional history, it will be presumed to have been employed in that sense in a written Constitution. McKinney v. Barker, 180 Ky. 526, 203 S. W. 303, L.R.A.1918E, 581.

Decisions made prior to the adoption of the Constitution may be considered. Lancaster v. City's Fifth Ward Election, 281 Pa. 131, 126 A. 199, 35 A.L.R. 815.

[17] McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

[18] Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620.

Annotation: 43 L.R.A. 37.

[19] Dimick v. Schiedt, 293 U. S. 474, 79 L. ed. 603, 55 S. Ct. 296, 95 A.L.R. 1150; Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 S. Ct. 655; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 S. Ct. 935; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; State v. Harp, 320 Mo. 1, 6 S. W. (2d) 562, citing R. C. L.; Horace Waters & Co. v. Gerard, 189 N. Y. 302, 82 N. E. 143, 24 L.R.A.(N.S.) 958, 121 Am. St. Rep. 886, 12 Ann. Cas. 397; McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.

[20] See COMMON LAW, supra, p. 158, § 5.

[1] Dimick v. Schiedt, 293 U. S. 474, 79 L. ed. 603, 55 S. Ct. 296, 95 A.L.R. 1150; Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Schick v. United States, 195 U. S. 65, 49 L. ed. 99, 24 S. Ct. 826, 1 Ann. Cas. 585; Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; Ludlam v. Ludlam, 26 N. Y. 356, 84 Am. Dec. 193.

[2] Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 S. Ct. 655; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456; Moore v. United States, 91 U. S. 270, 23 L. ed. 346 (per Bradley, J.); Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; State v. Harp, 320 Mo. 1, 6 S. W. (2d) 562, citing R. C. L.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131.

[3] Waring v. Clarke, 5 How. (U. S.) 441, 12 L. ed. 226; Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; State v. Harp, 320 Mo. 1, 6 S. W. (2d) 562, citing R. C. L.

[4] United States v. Wood, 299 U. S. 125, 81

rule that phrases in the Bill of Rights taken from the common law therefore must be construed in reference to the latter.[5] Hence, a construction according to the common law as it existed at the time of the adoption of the Constitution is applied to such provisions of the Bill of Rights, especially those amendments relating to trial by jury.[6] The English or Colonial law in force at the time of the adoption of the Constitution does not always apply in construing constitutional grants of governmental power, such as the power of Congress under the bankruptcy clause.[7]

The common law to be applied in construing constitutional provisions must be correlated in time with the Constitution and cannot be a common-law principle which was evolved or changed after the adoption of the organic law. Where the scope and meaning of a constitutional provision depend upon the common-law rule existing at the time of its adoption, the rule is to be determined as it existed at that time, without respect to subsequent changes therein.[8] It is apparent, therefore, that the common law does not govern the construction of all constitutional provisions; and the Supreme Court has declared that in applying the doctrine which justifies recourse to the common law for constitutional construction, that doctrine, like other canons of construction, must yield to more compelling reasons whenever they exist.[9] These reasons may be incongruity with the intent of the adopters or alteration of the plain purpose of the provisions. It is a cardinal rule of construction that a Constitution must be so construed as to give effect to the intention of the people who adopted it, and while it will be construed with reference to the doctrines of the common law, its intent will never be overruled by them.[10] The application of the doctrine is further subject to the qualification that the common-law rule, if and when invoked, shall be one not rejected by our ancestors as unsuited to their civil or political condition.[11]

4. Provisions Adopted from Other Constitutions

§ 67. Former Constitution of Same State.—Framers of a new Constitution who adopt provisions contained in a former Constitution, to which a certain construction has been given, are presumed as a general rule to have intended that these provisions should have the meaning attributed to them under the earlier instrument.[12] The embodiment in a Constitution, without change of

L. ed. 78, 57 S. Ct. 177, rehearing denied in 299 U. S. 624, 81 L. ed. 459, 57 S. Ct. 319; Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U. S. 648, 79 L. ed. 1110, 55 S. Ct. 595.

[5] Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A.L.R. 465; State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; State v. Harp, 320 Mo. 1, 6 S. W. (2d) 562, citing R. C. L.; Horace Waters & Co. v. Gerard, 189 N. Y. 302, 82 N. E. 143, 24 L.R.A.(N.S.) 958, 121 Am. St. Rep. 886, 12 Ann. Cas. 397; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L.R.A.1915F, 1093.

[6] Dimick v. Schiedt, 293 U. S. 474, 79 L. ed. 603, 55 S. Ct. 296, 95 A.L.R. 1150.

To ascertain the meaning of the Seventh Amendment guaranteeing trial by jury in Federal courts, resort must be had to the rules of the common law established at the time of the adoption of the constitutional provision. Ibid.

[7] Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U. S. 648, 79 L. ed. 1110, 55 S. Ct. 595.

[8] Dimick v. Schiedt, 293 U. S. 474, 79 L. ed. 603, 55 S. Ct. 296, 95 A.L.R. 1150.

[9] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

[10] Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191; Kreps v. Brady, 37 Okla. 754, 133 P. 216, 47 L.R.A.(N.S.) 106.

[11] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

[12] Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359, writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96; Ex parte Owens, 148 Ala. 402, 42 So. 676, 8 L.R.A.(N.S.) 888, 121 Am. St. Rep. 67; Cannon v. May, 183 Ark. 107, 35 S. W. (2d) 70, citing R. C. L.; McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am. St. Rep. 191; Denver v. Knowles, 17 Colo. 204, 30 P. 1041, 17 L.R.A. 135; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Sexauer v. Sta

verbiage, of provisions found in previous Constitutions precludes the court from giving their language a meaning different from that ascribed to the previous constitutional provisions,[13] notwithstanding the construction referred to is that placed on the old Constitution by the legislature and not by the judicial department of government.[14] A corollary of the rule is that where a word in an amendment or re-enactment of a Constitution is omitted, the omission should be presumed to have been intentional.[15] This general principle is universally applied unless there is something to indicate an intention of the framers of the new Constitution to alter the accepted construction.[16]

§ 68. Constitutions of Other States.—Where a constitutional provision has been borrowed from another state after it has been construed by the court of last resort of such state, the general rule is that the construction in such other state is adopted with the provision.[17] A state which adopts the language of the Fourteenth Amendment to the Federal Constitution in its own Bill of Rights adopts with it the interpretation it has received.[18] Where, however, the con-

Mill. Co. 173 Ind. 342, 90 N. E. 474, 26 L.R.A.(N.S.) 609; Bullitt v. Sturgeon, 127 Ky. 332, 105 S. W. 468, 14 L.R.A.(N.S.) 268; Morgan v. Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Re Sizer, 300 Mo. 369, 254 S. W. 82, citing R. C. L.; Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S. W. 196, citing R. C. L.; Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L.R.A. 390; State v. De Lorenzo, 81 N. J. L. 613, 79 A. 839, Ann. Cas. 1912D, 329; Com. v. Reeder, 171 Pa. 505, 33 A. 67, 33 L.R.A. 141; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.; Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484; Wichita Falls use of Whitham & Co. v. Williams, 119 Tex. 163, 26 S. W. (2d) 910, 79 A.L.R. 704; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L.R.A.1915F, 1093.

Annotation: 3 L.R.A. 390.

Readoption, in the form of constitutional amendments increasing the limits of taxation, of constitutional provisions embracing the subject of taxation on the part of cities and concerning the power of the legislature to authorize cities to levy taxes, in substantially the same language as that originally employed, must be construed as an adoption of the construction placed by the courts upon such constitutional provisions. Wichita Falls use of Whitham & Co. v. Williams, 119 Tex. 163, 26 S. W. (2d) 910, 79 A.L.R. 704.

[13] Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484.

[14] People v. Freeman, 80 Cal. 233, 22 P. 173, 13 Am. St. Rep. 122; Oakland Pav. Co. v. Tompkins, 72 Cal. 5, 12 P. 801, 1 Am. St. Rep. 17; State v. New Orleans R. & Light Co. 116 La. 144, 40 So. 597, 7 Ann. Cas. 724; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

[15] Sherrill v. O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841.

Annotation: 15 Ann. Cas. 786.

[16] State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L.R.A. 208, 59 Am. St. Rep. 515; Johnson v. Great Falls, 38 Mont. 369, 99 P. 1059, 16 Ann. Cas. 974.

[17] People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Re Schriber, 19 Idaho, 531, 114 P. 29, 37 L.R.A.(N.S.) 693; Adams v. Yazoo & M. Valley R. Co. 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L.R.A. 33; State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A.(N.S.) 1078, Ann. Cas. 1912A, 1063; State ex rel. Werts v. Rogers, 56 N. J. L. 480, 28 A. 726, 29 A. 173, 23 L.R.A. 354; Becker County Sand & Gravel Co. v. Wosick, 62 N. D. 740, 245 N. W. 454, citing R. C. L.; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; Travelers Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Robertson v. State, 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440; State v. Brown, 103 Vt. 312, 154 A. 579, 76 A.L.R. 1029; Norfolk & P. Traction Co. v. Ellington, 108 Va. 245, 61 S. E. 779, 17 L.R.A.(N.S.) 117 ("decision entitled to very great weight"); State ex rel. Amsterdamsch Trustees Kantoor v. Superior Ct. 15 Wash. 668, 47 P. 31, 37 L.R.A. 111, 55 Am. St. Rep. 907; Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L.R.A.1915F, 1093.

In the absence of any definite information as to the meaning which the framers of the Constitution attached to words in a provision of the Montana Constitution, it is fair to presume that they used the words with reference to the meaning which they had acquired in other states having a similar constitutional provision. State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A.(N.S.) 1078, Ann. Cas. 1912A, 1063.

Under the rule that when a provision is adopted from the Constitution or laws of another state or country, the construction placed thereon by the courts of that state or country is also impliedly adopted, the known and the settled construction of English statutes embodied in a state statute or Constitution is impliedly adopted therewith. Robertson v. State, 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

[18] State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

Whenever well-known constitutional phrases, such as the clauses relating to due process of law and the familiar guaranties of personal liberty, are incorporated by act of Congress in the organic law applying to a territorial government, the present principle of construction requires that they

stitutional provision appears to have been in force in several states before it was adopted, it seems that the assumption cannot properly be made that it was borrowed from any particular state, and accordingly the rule that constitutional provisions from an older source carry with them their accepted construction can no longer be strictly applied.[19]

The rule as to adopted construction does not apply where the provision is construed, after the time of its adoption, by the state borrowing it[20] or where the construction is adopted in the state originally possessing the constitutional provision after the provision has already been adopted in the borrowing state.[1] Moreover, the construction of a constitutional provision by the courts of the state, based on the Constitution in its entirety instead of on such a provision alone, is not adopted in another state by the adoption of the particular provision.[2]

C. Mandatory and Directory Provisions

§ 69. Generally.—In the interpretation of Constitutions, questions frequently arise as to whether particular sections are mandatory or directory. The courts usually hesitate to declare that a constitutional provision is directory merely[3] in view of the tendency of the legislature to disregard provisions which are not said to be mandatory.[4] Accordingly, it is the general rule to regard constitutional provisions as mandatory, and not to leave any discretion to the will of a legislature to obey or to disregard them.[5] This presumption as to mandatory quality is usually followed unless it is unmistakably manifest that the provisions are intended to be merely directory. The analogous rules distin-

be interpreted in accordance with the accepted meaning given to them in the older Constitutions. Serra v. Mortigo, 204 U. S. 470, 51 L. ed. 571, 27 S. Ct. 343; Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655; Robertson v. State, 63 Tex. Crim. Rep. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

The same meaning must be given to the words "due process of law" found in all state Constitutions and the Federal Constitution. Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110.

[19] Voss v. Waterloo Water Co. 163 Ind. 69, 71 N. E. 208, 66 L.R.A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978.

[20] Powell v. Spackman, 7 Idaho, 692, 65 P. 503, 54 L.R.A. 378.

[1] Kaplan v. Independent School Dist. 171 Minn. 142, 214 N. W. 18, 57 A.L.R. 185; Williams v. State, 81 N. H. 341, 125 A. 661, 39 A.L.R. 490; Keetch v. Cordner, — Utah, —, 62 P. (2d) 273, 108 A.L.R. 52.

[2] Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

[3] J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821 (recognizing rule).

[4] J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; State v. Tooker, 15 Mont. 8, 37 P. 849, 25 L.R.A. 560; State v. Tufley, 19 Nev. 391, 12 P. 835, 3 Am. St. Rep. 895.

The language of the article of the Federal Constitution creating and defining the judicial power of the United States was designed to be mandatory upon the legislature, so that Congress could not lawfully have refused to create a Supreme Court or to vest it with the constitutional jurisdiction. Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

[5] Hargraves v. Solomon, 178 Ark. 11, 9 S. W. (2d) 797, citing R. C. L.; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916; State v. Malcolm, 39 Idaho, 185, 226 P. 1083, citing R. C. L.; State ex rel. Childs v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.; Swift v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A. (N.S.) 404.

In State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39, the court points out the true nature of mandatory provisions, stating, "Much confusion has arisen by assuming that every mandatory provision requires literal compliance, while a directory provision only is satisfied with substantial compliance. . . . The entire disregard of a provision would not necessarily invalidate action taken under it if directory, but would if it was mandatory." The better rule seems to be that a substantial compliance may be sufficient even in regard to a mandatory provision.

Constitutional provisions relating to the payment of debts of, or claims against, states, towns, cities, counties, or other political subdivisions of the state are usually regarded as mandatory and imperative, as involving matters in which either the public interest or individual rights call for the exercise of a power which has been given to public officers. Annotation: 103 A.L.R. 812.

guishing mandatory and directory statutes are of little value in this connection and are rarely applied in passing upon the provisions of a Constitution.[6]

So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the Constitution be regarded as merely directory, but that each and every one of its provisions should be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes.[7]

Occasionally, in the body of a state Constitution there is inserted a declaration that its provisions are mandatory and prohibitory unless by express words declared to be otherwise.[8]

The use of the word "shall" is generally considered as an indication of the mandatory character of the provision,[9] although it has been held that in the construction of a Constitution, the word "shall" may receive a permissive interpretation when necessary to carry out the true intent of the provision in which that word is found.[10] Thus, a constitutional provision that it shall be the duty of the general assembly to cherish science is merely directory and cannot be enforced by the courts.[11] Permissive language is usually treated as intended in fact to be merely permissive.[12] Accordingly, the rule has been laid down that the word "may" should not be construed as "shall" in a constitutional provision, unless from the whole context the purpose plainly appears to be mandatory.[13]

§ 70. Application of Rules.—Prohibitions contained in a Constitution are nearly always construed as being mandatory.[14] For example, such is the effect which has been given to the clause that "no bill shall contain more than one subject, which shall be clearly expressed in its title."[15] But not every provision dealing with the enactment of statutes is necessarily mandatory. Thus, it has been held that a constitutional command that statutes should be preceded by the formal enacting clause, "Be it enacted, etc.," is directory merely and that the omission of such clause does not invalidate a statute.[16] On the other hand, a requirement that a proposed constitutional amendment, if agreed to by a

[6] Sjoberg v. Security Sav. & L. Asso. 73 Minn. 203, 75 N. W. 1116, 72 Am. St. Rep. 616; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.

The provisions of the Constitution are mandatory unless by their own terms they are made directory or simply permissive. Denny v. State, 144 Ind. 503, 42 N. E. 929, 31 L.R.A. 726.

[7] State ex rel. Childs v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L.R.A. 630, 56 Am. St. Rep. 459; State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; Harmison v. Ballot Comrs. 45 W. Va. 179, 31 S. E. 394, 42 L.R.A. 591; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L.R.A. 64.

Although a Constitution contains no provision to the effect that all its provisions are mandatory, all the provisions of a Constitution are mandatory, and the Constitution must be presumed to have been adopted with this understanding of its meaning. Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A.1917B, 808.

Constitutional mandates are imperative. Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648.

[8] State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560.

[9] People v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399.

[10] Williams v. Benet, 35 S. C. 150, 14 S. E. 288, 311, 14 L.R.A. 825.

[11] Scopes v. Tennessee, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821.

[12] State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152, 5 L.R.A.(N.S.) 340; State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L.R.A.(N.S.) 720.

[13] State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152, 5 L.R.A.(N.S.) 340.
Annotation: 5 L.R.A.(N.S.) 340.

[14] Wilkes County v. Call, 123 N. C. 308, 31 S. E. 481, 44 L.R.A. 252, appeal dismissed in 173 U. S. 461, 43 L. ed. 768, 19 S. Ct. 464.

[15] State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369; Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656.
As to the effect of these provisions on the enactment of statutes, see Statutes [Also 25 R. C. L. p. 876, §§ 123 et seq.].

[16] Cape Girardeau v. Riley, 52 Mo. 424, 14 Am. Rep. 427.

majority of the members elected to each of the two houses of the general assembly, "shall be entered on their journals" has been construed as being mandatory, and an entry on one or both of such journals by title or by other method of identification has been treated as a fatal irregularity.[17] A provision that every bill which has passed both houses of the legislature "shall be signed by the speakers thereof" has been held to be mandatory,[18] as has a similar provision that upon a bill passing each house, the presiding officer shall immediately sign it and have the signing entered upon the journal.[19] Constitutional provisions to the effect that a description of a proposed law, to be determined by the Attorney General, shall be printed on the top of initiative blanks and upon ballots are mandatory, and not directory, and must be complied with.[20] The courts have likewise stated that a constitutional provision requiring the governor of a state to return a bill within a specified number of days, if he desires to effect a veto, is mandatory.[1]

The same construction has been given to the provision that all laws of a general nature shall have a uniform operation throughout the state,[2] and likewise to a provision that no local law shall be passed on any subject unless a prescribed notice is given.[3] The principle also applies to a provision that an extra session of the legislature shall have no power to act upon subjects other than those specially designated in the proclamation by which the session is called[4] and to provisions relating to the manner of making an apportionment of the state for legislative purposes.[5] Nevertheless, it has been held that where it was provided that the secretary of the commonwealth should cause amendments to be published three months before the next general election, the provisions as to the time of publication were merely directory.[6]

The general rule has been laid down that if directions are given respecting the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it to be exercised in that time and mode only.[7] Accordingly, it has been held that a constitutional provision that a person appointed to the office of state treasurer shall qualify by taking the constitutional oath of office within one month after his appointment and that if he refuses or neglects to do so within that period of time, such refusal or neglect shall operate as a refusal to accept the office and a new appointment must be made is mandatory, and not merely directory.[8]

D. Self-executing Provisions

1. In General

§ 71. Generally.—Although a Constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the

17 Annotation: 3 Ann. Cas. 756.
See supra, § 29.

18 Lynch v. Hutchinson, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904.

19 George Bolln Co. v. North Platte Valley Irrig. Co. 19 Wyo. 542, 121 P. 22, 39 L.R.A.(N.S.) 868.

20 Re Opinion of Justices, 271 Mass. 582, 171 N. E. 294, 69 A.L.R. 388.

1 Capito v. Topping, 65 W. Va. 587, 64 S. E. 845, 22 L.R.A.(N.S.) 1089.

2 State v. Bargus, 53 Ohio St. 94, 41 N. E. 245, 53 Am. St. Rep. 628.

3 State v. Sayre, 142 Ala. 641, 39 So. 240, 4 Ann. Cas. 656.

4 Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847.

5 Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

6 Com. v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568.

7 State v. Tooker, 15 Mont. 8, 37 P. 840, 25 L.R.A. 560; State v. Winnett, 78 Neb. 379, 110 N. W. 1113, 10 L.R.A.(N.S.) 149, 15 Ann. Cas. 781.
As to the application of this principle in construction of provisions, see supra, § 57.

8 Archer v. State, 74 Md. 443, 22 A. 8, 28 Am. St. Rep. 261.

Constitution or mere restrictions upon the power of the legislature to pass laws, it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing.[9]

A constitutional provision is self-executing where no legislation is necessary to give effect to it.[10]

A clear distinction exists between the questions as to whether a constitutional provision is mandatory or directory[11] and whether it is self-executing or requires legislation in order to give it effect. A provision may be mandatory without being self-executing.[12] The question has been said to be one of intention in every case.[13]

§ 72. Presumption as to Self-executing Effect.—When the Federal Constitution and the first state Constitutions were formed, a Constitution was treated as establishing a mere outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens, but leaving all matters of administration and policy to the departments created by the Constitution. This form of the organic instrument gave rise to a general presumption that legislation is necessary in order to give effect to the provisions of the Constitution and that its terms operate primarily as commands to the officers and departments of the government. During the last fifty years, state Constitutions have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments.[14] Accordingly, the presumption now is that all provisions of the Constitution are self-executing.[15] As in the case of the question whether a constitutional provision is mandatory or directory,[16] the courts may be influenced in interpreting such provisions as self-executing rather than as requiring legislation, by the knowledge that if not treated as self-executing, the legislature would have the power to ignore and practically nullify the directions of the fundamental law.[17]

9 Illinois C. R. Co. v. Ihlenberg (C. C. A. 6th) 75 F. 873, 34 L.R.A. 393; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545, citing R. C. L.
Annotation: 7 Ann. Cas. 627.

10 State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L.; Becker v. Atlantic Coast Line R. Co. 128 S. C. 131, 121 S. E. 476, citing R. C. L.; State ex rel. Flanagan v. South Dakota Rural Credits Bd. 45 S. D. 619, 189 N. W. 704, citing R. C. L.
For a test as to when a constitutional provision measures up to this description, see infra, § 74.

11 State ex rel. Flanagan v. South Dakota Rural Credits Bd. 45 S. D. 619, 189 N. W. 704, citing R. C. L.
See supra, § 69.

12 Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; State ex rel. Flanagan v. South Dakota Rural Credits Bd. 45 S. D. 619, 189 N. W. 704, citing R. C. L.
Annotation: 18 Ann. Cas. 200.

13 Illinois C. R. Co. v. Ihlenberg (C. C. A. 6th) 75 F. 873, 34 L.R.A. 393; Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L.; Newport News v. Woodward, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625.
Annotation: 7 Ann. Cas. 627.

14 Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; State ex rel. Curtis v. Ross, 144 La. 898, 81 So. 386, citing R. C. L.; State ex rel. Twichell v. Hall, 44 N. D. 459, 171 N. W. 213, citing R. C. L.

15 Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; State ex rel. Curtis v. Ross, 144 La. 898, 81 So. 386, citing R. C. L.; Detroit v. Oakland Circuit Judge, 237 Mich. 446, 212 N. W. 207, citing R. C. L.; State ex rel. Twichell v. Hall, 44 N. D. 459, 171 N. W. 213, citing R. C. L.; Beatty v. Wittekamp, 171 S. C. 326, 172 S. E. 122, citing R. C. L.; Chick Springs Water Co. v. State Highway Dept. 159 S. C. 481, 157 S. E. 842, citing R. C. L.; Brice v. McDow, 116 S. C. 324, 108 S. E. 84, citing R. C. L.

16 See supra, § 69.

17 Way v. Barney, 116 Minn. 285, 133 N. W. 801, 38 L.R.A.(N.S.) 648, Ann. Cas.

§ 73. Provisions Addressed to Legislature.—It has been said that in the determination of whether a provision is self-executing, the question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature.[18] One court has concisely declared that in determining when a constitutional provision is self-executing, it would distinguish between declarative constitutional limitation of legislative power on a given subject, within which limitation legislation might or should be enacted, and positive constitutional inhibition, which inhibition no legislative act could relieve or modify. The former might require future legislation; the latter must, by reason of its very nature, be self-executing.[19] A provision that the legislature should make suitable provisions for carrying a constitutional amendment into effect is obviously addressed to the legislature and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature.[20] This may be illustrated by a constitutional provision that the legislature should provide by law for a uniform and equal rate of assessment and taxation and should prescribe such regulations as should secure a just valuation. Appropriate legislation is clearly necessary to carry these directions into effect.[1] Similarly, a provision is not self-executing when it merely indicates a basis of classification of municipalities, but does not designate the time and manner of transition from one class to another.[2] A constitutional

1913A, 719; Beatty v. Wittekamp, 171 S. C. 326, 172 S. E. 122, citing R. C. L.; Chick Springs Water Co. v. State Highway Dept. 159 S. C. 481, 157 S. E. 842, citing R. C. L.; Brice v. McDow, 116 S. C. 324, 108 S. E. 84, citing R. C. L.

Constitutional provisions should never be construed as dependent for their efficacy and operation upon legislative will. Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404.

[18] State v. Redman, 183 Ind. 332, 109 N. E. 184, citing R. C. L.; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; Farmers & M. State Bank v. Consolidated School Dist. 174 Minn. 286, 219 N. W. 163, 65 A.L.R. 1407; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

A provision is not self-executing if its terms look forward to and require ulterior action upon the part of the lawmaking branch of the government. State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

[19] Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.

[20] Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750; Russell v. County Bd. of Edu. 247 Ky. 703, 57 S. W. (2d) 681, citing R. C. L.; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.; State v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L.R.A.(N.S.) 720; Ex parte Wagner, 210 Okla. 33, 95 P. 435, 18 Ann. Cas. 197; O'Connor v. Armstrong, 299 Pa. 390, 149 A. 655, citing R. C. L.

Annotation: 7 Ann. Cas. 628; 18 Ann. Cas. 200.

A promissory note given for slaves imported into Mississippi was not invalidated by the provision of the Mississippi Constitution of October 26, 1833, that "the introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the 1st day of May, 1833," where such slaves were imported after that act, but prior to the Act of May 13, 1837, purporting to carry that provision into effect, as such constitutional provision was necessarily deemed merely directory to the legislature, and required action by the latter in order to bring it into full operation. Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800.

In an action on a promissory note given in Mississippi in 1839 for slaves in that State who had been imported in 1835 and 1836, the consideration was not held illegal under the clause in the Constitution of Mississippi providing that "the introduction of slaves into this State as merchandise or for sale shall be prohibited from and after the 1st day of May, 1833," since the prohibition required the action of the legislature in order to bring it into full operation; and therefore the contract was valid. Rowan v. Runnels, 5 How. (U. S.) 134, 12 L. ed. 85.

[1] State Tax Comrs. v. Holliday, 150 Ind. 216, 49 N. E. 14, 42 L.R.A. 826; Leser v. Lowenstein, 129 Md. 244, 98 A. 712, citing R. C. L.

Annotation: 16 L.R.A. 284.

[2] Murray v. State, 91 Ohio St. 220, 110 N. E. 471, Ann. Cas. 1916D, 864.

The provisions of Ohio Const. Art. 18, as amended in September, 1912, allowing home rule for cities are not self-executing, but continue the general laws for the government of cities and villages in force until the 15th of November following, and thereafter until changed by the enactment of general laws for their amendment, or by additional laws to be ratified by the electors of the municipality to be affected thereby, or by the adoption of a charter by the electors of a municipality in the mode pointed out in the article. State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 102 N. E. 670, 48 L.R.A.(N.S.) 720, Ann. Cas. 1914D, 949.

provision which declares that in any county which shall have adopted township organization the question of discontinuing the same may be submitted to a vote of the electors at a general election in the manner that shall be provided by law is not self-executing.[3] A section of a state Constitution requiring that "suitable laws" shall be passed for the safeguarding of state and school funds and that it shall be embezzlement for any public officer to deposit such funds in banks "except in the manner prescribed by law" is not self-executing.[4]

Minor details may be left for the legislature without impairing the self-executing nature of constitutional provisions. Thus, it has been held that clauses defining the constituencies by which members of the general assembly shall be elected and establishing the qualifications requisite for the right of suffrage may be self-executing and self-sustaining, although there are left for legislative action the apportionment of members among the counties in a fixed ratio, and the making of regulations for holding elections, the canvassing of the votes, and the certification of the result.[5] Similarly, a constitutional provision that particular officials shall be paid by salary instead of by fees is self-executing, although the determination of the amount of the salary is left to the legislature.[6]

2. Tests

§ 74. Generally.—One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles,[7] but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment.[8] Therefore, if a constitutional provision either directly or by implication imposes a duty

[3] State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1.

[4] Farmers & M. State Bank v. Consolidated School Dist. 174 Minn. 286, 219 N. W. 163, 65 A.L.R. 1407.

[5] Hamilton v. Secretary of State, 227 Mich. 111, 198 N. W. 843, citing R. C. L.; Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548.

[6] Hamilton v. Secretary of State, 227 Mich. 111, 198 N. W. 843, citing R. C. L.; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114; Anderson v. Whatcom County, 15 Wash. 47, 45 P. 665, 33 L.R.A. 137.

Annotation: 16 L.R.A. 285; 7 Ann. Cas. 631.

[7] Detroit v. Oakland Circuit Judge, 237 Mich. 446, 212 N. W. 207, citing R. C. L.; Ivie v. Bailey, 319 Mo. 474, 5 S. W. (2d) 50, 57 A.L.R. 881; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; State ex rel. Linde v. Hall, 35 N. D. 34, 149 N. W. 281, citing R. C. L.

Annotation: 7 Ann. Cas. 628; 18 Ann. Cas. 200.

[8] Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 S. Ct. 210; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 S. Ct. 477; Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. ed. 800; Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; Gates v. Sweitzer, 347 Ill. 353, 179 N. E. 837, 79 A.L.R. 1151; Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; State v. Redman, 183 Ind. 332, 109 N. E. 184, citing R. C. L.; Detroit v. Oakland Circuit Judge, 237 Mich. 446, 212 N. W. 207, citing R. C. L.; State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281, citing R. C. L.; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156; Newport News v. Woodward, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625; Anderson v. Whatcom County, 15 Wash. 47, 45 P. 665, 33 L.R.A. 137; Thorne v. Clarksburg, 88 W. Va. 251, 106 S. E. 644, citing R. C. L.

Annotation: 50 L.R.A.(N.S.) 198; L.R.A. 1917B, 18; 51 Am. St. Rep. 667; 7 Ann. Cas. 627; 18 Ann. Cas. 199; Ann. Cas. 1914C, 1116.

A provision reading "if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county; and all laws in force in relation to counties not having township organization shall immediately take effect and be in force in said county," is self-executing. This is true because the clause "merely expresses a status which will instantly result from the election required to be held. Statutory language would be impotent to add aught to the Constitution's expression of this resulting status, and so the clause is self-executing. It is a provision complete in itself and needs no legislation to put it in force." State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1.

upon an officer, no legislation is necessary to require the performance of such duty.[9] Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation.[10] In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.[11] Thus, a constitutional provision which reduces the number of grand jurors from sixteen to seven, five of whom must concur in the finding of an indictment, is self-executing.[12] Similarly, a constitutional provision that a corporate charter shall be forfeited if certain conditions are not complied with within a specified time is self-executing.[13]

An additional general rule is that where there is no ambiguity and the purpose of the provision would be frustrated unless it should be given immediate effect, it will be treated as self-executing.[14]

It has also been decided that when a constitutional provision or a statute is declarative of the common law, it may usually be treated as self-executing.[15]

It is generally recognized that legislation is unnecessary to enable the courts to give effect to constitutional provisions guaranteeing the fundamental rights of life, liberty, and protection of property.[16] Thus, a constitutional amendment that no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information has been construed as self-operating from the time it takes effect.[17] The same construction has been given to a provision forbidding the taking or damaging of property for public use without just compensation.[18] A provision of a state Constitution giving the legislature full power to correct abuses and prevent unjust discrimination and excessive charges is self-executing to the extent that contracts made after it goes into effect are subject to the possibility of the exercise of such power.[19]

In cases where a provision is construed as self-executing, the common law will furnish an appropriate remedy in the absence of one expressly given by Constitution or statute.[20]

§ 75. Absence of Express Remedies as to Rights and Liabilities.—The omission from a Constitution of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to

[9] State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114.

[10] State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156.
See also supra, § 71.

[11] Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; State ex rel. Linde v. Hale, 35 N. D. 34, 159 N. W. 281, citing R. C. L.; O'Connor v. Armstrong, 299 Pa. 390, 149 A. 655, citing R. C. L.

[12] Re Wright, 3 Wyo. 478, 27 P. 565, 14 L.R.A. 748, 31 Am. St. Rep. 94.

[13] Annotation: Ann. Cas. 1914A, 936.

[14] Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750.
Annotation: 7 Ann. Cas. 627.

[15] Trust Co. of Georgia v. State, 109 Ga. 736, 35 S. E. 323, 48 L.R.A. 520; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146.

[16] Erdman v. Mitchell, 207 Pa. 79, 56 A. 327, 63 L.R.A. 534, 99 Am. St. Rep. 783; Thorne v. Clarksburg, 88 W. Va. 251, 106 S. E. 644, citing R. C. L.
Annotation: L.R.A.1917B, 18.

[17] State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115.

[18] Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L.R.A. 658, 41 Am. St. Rep. 684; Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co. 97 Mo. 457, 10 S. W. 826, 3 L.R.A. 240; Searle v. Lead, 10 S. D. 312, 73 N. W. 101, 39 L.R.A. 345; Swift v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404.
Annotation: 16 L.R.A. 283; 7 Ann. Cas. 632; 18 Ann. Cas. 201; Ann. Cas. 1914C, 1118.

[19] Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 S. Ct. 23.

[20] Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; Swift v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L.R.A.(N.S.) 404.

be self-executing. The maxim, "ubi jus ibi remedium," is as old as the law itself. Accordingly, it has been decided that if a state Constitution declares that a liability shall exist in certain specified circumstances, an action may be maintained to enforce such liability, notwithstanding the nonexistence of any legislation upon the subject.[1] This is based upon the principle that if there is no statute especially adapted to enforce a constitutional right, it enforces itself by its own inherent potency.[2]

This rule has been applied in giving effect to constitutional provisions imposing liability on stockholders for debts of a bankrupt corporation where there is nothing indicative of an intention that ancillary legislation should be had to carry such provisions into effect and where there is nothing in the nature of the liability imposed to render such legislation necessary.[3] It has been said that such a provision should be construed as self-executing; otherwise the legislature, by its nonaction, could emasculate it. Moreover, while the legislature may prescribe the procedure for the enforcement of the liability, in the absence of such legislation, equity can and will find a way for its enforcement.[4] The mere fact that legislation may supplement and add to, or prescribe a penalty for the violation of, a self-executing provision does not render such provision ineffective in the absence of such legislation.[5] Likewise, a provision in a Constitution making any bank officer receiving deposits with knowledge of the insolvency of the bank individually liable for such deposits has been held to be effective without legislation.[6] Where, however, a Constitution provides that debts of corporations shall be secured by the individual liability of the stockholders and such other means as shall be provided by law, such provision has been construed as not self-executing,[7] since the language used plainly contemplates that legislation is necessary in order to make it effectual.[8] Even as to identical language, the authorities are not uniform. In some jurisdictions the provisions under discussion have been held to be self-executing.[9]

In spite of the broad recognition of the principle that the law will imply a remedy whenever necessary, it has been held that the constitutional provision that every man shall have a certain remedy for all the injuries or wrongs done to his person, property, or character is not self-executing.[10] With reference

[1] Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; State v. Redman, 183 Ind. 332, 109 N. E. 184, citing R. C. L.; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626.

[2] State v. Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422.

[3] Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 S. Ct. 477; Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861; Western P. R. Co. v. Godfrey, 166 Cal. 346, 136 P. 284, Ann. Cas. 1915B, 825; Gaiser v. Buck, 203 Ind. 9, 179 N. E. 1, 82 A.L.R. 1348; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626.
Annotation: 44 L. ed. 588; 7 Ann. Cas. 630, 631; Ann. Cas. 1914C, 1118.
See latest Minnesota provision construed in Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798, changing the former provision, and empowering the legislature to provide for limiting or otherwise regulating the liability of stockholders.

[4] Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; Way v. Barney, 116 Minn. 285, 133 N. W. 801, 38 L.R.A.(N.S.) 648, Ann. Cas. 1913A, 719.
Annotation: 89 Am. St. Rep. 168.

[5] State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114.

[6] Annotation: 44 L. ed. 588; 7 Ann. Cas. 631.

[7] Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 42 L.R.A. 804, 68 Am. St. Rep. 194; Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L.R.A. 757, 51 Am. St. Rep. 654.
Annotation: 44 L. ed. 588; 16 L.R.A. 285; 68 Am. St. Rep. 202; 7 Ann. Cas. 631; 18 Ann. Cas. 201; Ann. Cas. 1914C, 1118.

[8] Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L.R.A. 757, 51 Am. St. Rep. 654.

[9] Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 S. Ct. 477; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114.
Annotation: 44 L. ed. 588; Ann. Cas. 1914C, 1116.

[10] Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

to the extent to which the Federal Constitution may be claimed to be self-executing in impliedly furnishing a remedy for possible liability for acts done under laws declared to be in conflict with its provisions, the Supreme Court has stated that the Constitution, standing alone, without more, does not create a paramount unchangeable liability to an action of tort on the part of all persons who may take part in enforcing a state law that it invalidates. It leaves the remedies to Congress and the states.[11]

§ 76. Mandates as to Legislation.—In adopting Constitutions the people frequently leave to the legislature the enactment of statutes as to detailed matters in order to make the provisions fully operative.[12] A self-executing provision of the Constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the Constitution and further the exercise of constitutional right and make it more available.[13] The mere fact that legislation may supplement and add to, or prescribe a penalty for the violation of, a self-executing provision of a Constitution does not render such a provision ineffective in the absence of such legislation.[14] Thus, although the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States are self-executing [15] and the Thirteenth, by its unaided force and effect, abolished slavery and established universal freedom,[16] legislation was considered necessary to meet the various cases and circumstances affected by these amendments.[17]

The rule is established that constitutional provisions which wholly omit the detailed provisions needed to make them effective are not to be considered as self-executing. Illustrations of the rule are constitutional commands directed to the legislature to pass suitable laws providing for religious instruction in schools [18] and mandates to establish election machinery for enacting legislation by the initiative and referendum,[19] although the initiative and referendum provisions in some state Constitutions providing for vote of the people in this manner and furnishing machinery to carry the scheme into operation have been held to be self-executing.[20]

Constitutional provisions relating to taxes, though differing greatly in terms, illustrate these tests graphically. It has been held that constitutional mandates are not self-executing where they provide that property shall be uniformly taxed,[1] that it shall be taxed in proportion to its value,[2] or that the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes.[3] The opposite conclusion has been reached as to provisions that the general assembly should levy a capitation tax equal to the tax on property valued at a designated amount;[4] that any municipal corporation incurring bonded indebtedness shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay interest falling due and the principal within twenty years;[5] that the property of the United States, the state, county, and municipal corporations shall be exempt from taxation;[6] and as to a clause providing for the taxation and rate of assessment of patented mines or mining claims.[7] Taxation provisions limiting the rate of taxation and the manner in which the proceeds shall be appropriated and authorizing levies for drainage and school districts have also been held to be self-executing.[8] Thus, a mandate of the Constitution in regard to school taxes and the devotion of the funds to school purposes may be self-executing to the extent that no legislative appropriation of the school funds will be needed.[9]

Another example is the homestead exemption provisions. If the Constitution provides that a homestead shall be exempt from execution, the provision is self-executing;[10] but if it provides that the legislature shall protect a homestead by law from forced sale, or that homestead exemptions shall be recognized by wholesome laws, or that the legislature shall by general law exempt certain property, the provision is not self-executing.[11]

Among other illustrations of mandatory constitutional provisions which are not self-executing may be mentioned those that direct that the fitness of persons to be appointed to public office shall be ascertained as far as practicable by competitive civil service examinations. Such provisions are merely announcements of a general principle clearly requiring legislation for their enforcement.[12]

3. Prohibitions

§ 77. Generally.—Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void.[13] Pro-

11 Burrill v. Locomobile Co. 258 U. S. 34, 66 L. ed. 450, 42 S. Ct. 256.

12 State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.; Ex parte Smith, 24 Okla. Crim. Rep. 415, 218 P. 708, citing R. C. L.; State ex rel. Flanagan v. South Dakota Rural Credits Bd. 45 S. D. 619, 189 N. W. 704, citing R. C. L.; State ex rel. Shepard v. Superior Ct. 60 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925.

13 Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

14 **A mandate to the legislature to enact** appropriate legislation to carry into effect a constitutional amendment will not prevent the amendment from being self-executing. Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

A constitutional provision which permits such legislation to be enacted "as may aid the operation" thereof may be self-executing. State ex rel. Clark v. Harris, 74 Or. 573, 144 P. 109, Ann. Cas. 1916A, 1156.

See supra, § 75.

15 Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

16 Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

17 Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18.

18 State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.; Board of Education v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233; State ex rel. Flanagan v. South Dakota Rural Credits Bd. 45 S. D. 619, 189 N. W. 704, citing R. C. L.

19 State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.; Ex parte Wagner, 21 Okla. 33, 95 P. 435, 18 Ann. Cas. 197.

Annotation: 18 Ann. Cas. 202; Ann. Cas. 1914C, 1119.

20 Annotation: 18 Ann. Cas. 202, 203; Ann. Cas. 1914C, 1119.

1 Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 S. Ct. 210; Hart v. Smith, 159 Ind. 182, 64 N. E. 661, 58 L.R.A. 949, 95 Am. St. Rep. 280; State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.

Annotation: 7 Ann. Cas. 632; 18 Ann. Cas. 202.

2 McHenry v. Downer, 116 Cal. 20, 47 P. 779, 45 L.R.A. 737.

Annotation: 7 Ann. Cas. 632.

3 State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

4 State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.; Russell v. Ayer, 120 N. C. 180, 27 S. E. 133, 37 L.R.A. 246, overruled in Kitchin v. Wood, 154 N. C. 565, 70 S. E. 995.

5 Gates v. Sweitzer, 347 Ill. 353, 179 N. E. 837, 79 A.L.R. 1151.

6 Egan Independent Consol. School Dist. v. Minnehaha County, — S. D. —, 270 N. W. 527, 108 A.L.R. 572.

7 Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.

8 Annotation: 7 Ann. Cas. 632; Ann. Cas. 1914C, 1119.

9 Dickinson v. Edmondson, 120 Ark. 80, 178 S. W. 930, Ann. Cas. 1917C, 913.

10 Annotation: 7 Ann. Cas. 631.

11 Annotation: 7 Ann. Cas. 632; Ann. Cas. 1914C, 1118.

12 State ex rel. Burnett v. Deck, 106 Kan. 518, 188 P. 238, citing R. C. L.; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L.R.A. 809, explaining People ex rel. McClelland v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399.

13 Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Beard v. Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L.R.A. 402, 44 Am. St. Rep. 222; Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114.

Annotation: 16 L.R.A. 282; 7 Ann. Cas. 627; 18 Ann. Cas. 200; Ann. Cas. 1914C, 1116.

Prohibitions need not be expressly made

hibitions against municipal corporations making donations to private corporations,[14] prohibitions against the extension of credit by political subdivisions except upon vote first had,[15] limitations upon the indebtedness of municipalities,[16] prohibitions against the appropriation or use of any public money or property for the use, benefit, or support of any church or system of religion,[17] prohibitions against county boards paying money to schools controlled by churches,[18] prohibitions against changes in salaries or emoluments of public officers after their election or appointment or during their term of office, unless by operation of law enacted prior to such election or appointment,[19] and limitations upon municipal tax rates[20] have all been held to be self-executing.

The same interpretation has been given to prohibitions against foreign corporations doing business within a state without having an authorized agent,[1] although there is some authority to the contrary on this question.[2] For example, a constitutional provision that no foreign corporation shall do business unless it has a known place of business and an authorized agent there in the state is not self-executing without any provision as to how the agent shall be designated or the place of business made known.[3]

Prohibitions denying the right of the legislature to authorize corporations to form combinations so as to lessen competition,[4] directing that no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law,[5] forbidding the manufacture in, or introduction into, the state of intoxicating liquors,[6] and forbidding marriages between white and colored persons[7] have been declared to be self-enforcing. The Nineteenth Amendment to the Federal Constitution, prohibiting a state from abridging

in the Constitution, for a declaration of a fundamental right may be the equivalent of a prohibition against legislation impairing the right. Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540.

A prohibitory provision in a Constitution limiting the power of the legislature necessarily carries with it a like prohibition as to the lawmaking power of every municipal corporation, the creature of the legislature. Subsequent to the adoption of the Constitution, every ordinance of a municipal corporation, in the exercise of its legislative powers, must be construed as if that section of the Constitution was written into it. New Decatur v. American Teleph. & Teleg. Co. 176 Ala. 492, 58 So. 613, Ann. Cas. 1915A, 875.

Exemptions when regarded as prohibitions are self-executing. Annotation: 16 L.R.A. 284.

[14] Washingtonian Home v. Chicago, 157 Ill. 414, 41 N. E. 893, 29 L.R.A. 798; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; Dakota Synod v. State, 2 S. D. 366, 50 N. W. 632, 14 L.R.A. 418.
Annotation: 7 Ann. Cas. 630.

[15] Norton v. Taxing Dist. 129 U. S. 479, 32 L. ed. 774, 9 S. Ct. 322.

[16] Beard v. Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L.R.A. 402, 44 Am. St. Rep. 222; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.
Annotation: 7 Ann. Cas. 629; Ann. Cas. 1914C, 1117.

[17] Connell v. Gray, 33 Okla. 591, 127 P. 417, 42 L.R.A.(N.S.) 336, Ann. Cas. 1914B, 399.

[18] Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 1 L.R.A. 437, 8 Am. St. Rep. 386; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; Dakota Synod v. State, 2 S. D. 366, 50 N. W. 632, 14 L.R.A. 418.

[19] Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

[20] State ex rel. Emerson v. Mound City, 335 Mo. 702, 73 S. W. (2d) 1017, 94 A.L.R. 923.

[1] American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.
Annotation: 7 Ann. Cas. 630.

[2] Annotation: 7 Ann. Cas. 630; Ann. Cas. 1914C, 1118.

[3] St. Louis, A. & T. R. Co. v. Fire Asso. of Phila. 60 Ark. 325, 30 S. W. 350, 28 L.R.A. 83.

[4] Trust Co. of Ga. v. State, 109 Ga. 736, 35 S. E. 323, 48 L.R.A. 520; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.

[5] J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 P. 649, Ann. Cas. 1914C, 1114.

[6] Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

[7] Gabisso's Succession, 119 La. 704, 44 So. 438, 11 L.R.A.(N.S.) 1082, 121 Am. St. Rep. 529, 12 Ann. Cas. 574; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.

the right of any citizen to suffrage because of sex, is self-executing.[8] It has even been held that a self-executing mandate is contained in a constitutional provision that knowledge by any injured employee of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby.[9]

The general principle that prohibitory provisions prevent their violation without legislation does not go beyond reasonable limits. Such provisions are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law.[10]

E. Contemporaneous and Long-continued Construction

1. In General

§ 78. Fundamental Principles.—In questions of constitutional construction and in the determination of the constitutionality of statutes, great weight has always been attached to contemporaneous exposition of the meaning of fundamental law,[11] not only where such interpretation is that of the courts, but also where it is that of other departments of government.[12] An opinion of a state attorney general as to the effect of an amendment to the state Constitution to supersede previously existing provisions, though not binding on a Federal court, is entitled to great respect and should not be departed from lightly.[13]

It has further been said that a construction not emanating from judicial decision, but adopted by the legislative or executive departments of the state and, moreover, long accepted by the various agencies of government and the people, will usually be accepted as correct by the judicial department.[14]

[8] Annotation: 71 A.L.R. 1332.

[9] Illinois C. R. Co. v. Ihlenberg (C. C. A. 6th) 75 F. 873, 34 L.R.A. 393; J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244, citing R. C. L.

[10] Wren v. Dixon, 40 Nev. 170, 161 P. 722, 167 P. 324, Ann. Cas. 1918D, 1064.

[11] Pocket Veto Case (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747; Cooley v. Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; McPherson v. Blacker, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587, affirmed in 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Biggs v. McBride, 17 Or. 640, 21 P. 878, 5 L.R.A. 115; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.; State v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L.R.A. 523; King and Queen County v. Cox, 155 Va. 687, 156 S. E. 755, citing R. C. L.; State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 P. 23, Ann. Cas. 1916B, 810; Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272.
Annotation: Ann. Cas. 1912B, 275.

The courts will consider the contemporaneous construction of the Constitution in passing upon the constitutionality of statutes. Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

[12] Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531; White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L.R.A. 402; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658.

[13] Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798.

A statement prepared by the attorney general of the purpose and effect of a proposed constitutional amendment, in pursuance of a requirement that such a statement be made and published to the electorate, is entitled to consideration when the effect of such amendment comes before the courts. Ibid.

[14] Pocket Veto Case (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; Hampton v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Downes v. Bidwell, 182 U. S. 244, 46 L. ed. 1088, 21 S. Ct. 770; Sarlis v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Gantt v. Brown, 244 Mo. 271, 149 S. W. 644, Ann. Cas. 1913D, 1283; Ex parte Crump, 10 Okla. Crim. Rep. 133, 135 P. 428, 47 L.R.A.(N.S.) 1036; National Surety Co. v. Starkey, 41 S. D. 356, 170 N. W. 583, citing R. C. L.; State v. Nashville Baseball Club, 127 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1914B, 1243.

Long-settled and established practice is a consideration of great weight in interpreting constitutional provisions relating to the machinery of government. Pocket Veto Case (Okanogan Indians v. United

The contemporaneous and long-continued construction of a statute by the executive officers of the government whose duty it is to execute it is entitled to great respect and may be an important factor in upholding its constitutionality.[15]

The presumption is that those who were the contemporaries of the makers of the Constitution have claims to deference of later tribunals because they had the best opportunities of informing themselves of the understanding of the framers and of the sense put upon the Constitution by the people when it was adopted.[16]

The general principle favoring contemporaneous construction is usually applied more cautiously to Constitutions than to laws, since the people have greater opportunities of instructing the members of the legislature than have the members of constitutional conventions, which are in actual fact held at but infrequent intervals.[17]

The giving weight to contemporaneous construction put upon an enactment by those charged with its execution applies only in cases of ambiguity and doubt.[18] Plain and unambiguous constitutional provisions cannot be varied by legislative, executive, or departmental construction.[19] There is no room for construction of a Constitution outside of the words themselves, if they are unambiguous, and the rules as to the authority of contemporaneous exposition are unimportant in such cases.[20] The construction placed upon a constitutional provision by the legislative and executive branches of the government will not

States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434.

Unless a long-continued interpretation by the executive and legislative departments of the government is manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770.

15 Smiley v. Holm, 285 U. S. 355, 76 L. ed. 795, 52 S. Ct. 397; Pocket Veto Case (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; McGrain v. Daugherty, 273 U. S. 135, 71 L. ed. 580, 47 S. Ct. 319, 50 A.L.R. 1; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 S. Ct. 699; State v. Walsen, 17 Colo. 170, 28 P. 1119, 15 L.R.A. 456; State v. McCook, 109 Conn. 621, 147 A. 126, 64 A.L.R. 1453; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Ex parte Crump, 10 Okla. Crim. Rep. 133, 135 P. 428, 47 L.R.A.(N.S.) 1036; State v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019.

16 Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606 (per Johnson, J.); Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A. 1916C, 482; McPherson v. Blacker, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587, affirmed in 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; State ex rel. Guerguin v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L.R.A. 523.

The fact that a statute was adopted upon the recommendation of code commissions composed of men learned in the law and familiar with the previous legislation on the subject, some of the members of the commission having been members of the constitutional convention, is entitled to great weight as a contemporaneous construction of the Constitution. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191.

17 Pingree v. Auditor Gen. (Pingree v. Dix) 120 Mich. 95, 78 N. W. 1025, 44 L.R.A. 679.

18 Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; United States v. Tanner, 147 U. S. 661, 37 L. ed. 321, 13 S. Ct. 436; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 S. Ct. 582; Swift Co. v. United States, 105 U. S. 691, 26 L. ed. 1108; Peabody v. Russel, 302 Ill. 111, 134 N. E. 150, 20 A.L.R. 972; Fergus v. Brady, 277 Ill. 272, 115 N. E. 393, Ann. Cas. 1918B, 220; Pingree v. Auditor Gen. (Pingree v. Dix) 120 Mich. 95, 78 N. W. 1025, 44 L.R.A. 679; State v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548; State v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019. Annotation: 13 Am. St. Rep. 145.

19 State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497.

20 State ex rel. Weiss v. District Bd. 76 Wis. 177, 44 N. W. 967, 7 L.R.A. 330, 20 Am. St. Rep. 41.

In case of doubt as to the proper construction of any particular provision of the Constitution, a contemporaneous interpretation or the subsequent practical construction is entitled to great weight; but acquiescence in a statute cannot prevail over a plain provision of the Constitution. State v. Ide, 35 Wash. 576, 77 P. 961, 67 L.R.A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634.

A long and uniform sanction by law revisers and lawmakers of a legislative assertion and exercise of power is entitled to great weight in construing an ambiguous or doubtful constitutional provision, but is entitled to no weight if the statute in question is in conflict with the plain meaning of the constitutional provision. Kingsley v. Merrill, 122 Wis. 185, 99 N. W. 1044, 67 L.R.A. 200, 2 Ann. Cas. 748.

be permitted to overturn and render nugatory a clear provision of the Constitution, in cases where the meaning of a clause in the instrument is capable of two interpretations.[1]

Contemporaneous construction is further limited by the principle of priority in time. Legislative, executive, or departmental construction of a constitutional provision subsequent to a judicial construction by the courts is of no effect in ascertaining its meaning.[2]

§ 79. —**Legislative Interpretation.**—The principle of contemporaneous construction may be applied to the construction given by the legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is generally conceded as being entitled to great weight.[3] Thus, it has been stated that contemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation.[4] Such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention of a constitutional provision.[5] While neither length of time nor legislative action, though oft repeated, will sanction a violation of the organic law, resort may be had to such sources to discover the meaning of a provision of doubtful import.[6] The legislature's determination of what is a local affair and what is a matter of state-wide concern within a constitutional provision empowering municipalities to determine their local affairs and government subject to such

1 Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482.

2 State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497.

3 United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372; Clark v. Boyce, 20 Ariz. 544, 185 P. 136, citing R. C. L.; Laird v. Sims, 16 Ariz. 521, 147 P. 738, L.R.A.1915F, 519; Pacific Indem. Co. v. Industrial Acci. Commission, 215 Cal. 461, 11 P. (2d) 1, 82 A.L.R. 1170; Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482; Johnson v. Diefendorf, 56 Idaho, 620, 57 P. (2d) 1068, citing R. C. L.; Peabody v. Russel, 302 Ill. 111, 134 N. E. 150, 20 A.L.R. 972; People v. Hutchison, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770; Chicago v. McCoy, 136 Ill. 344, 26 N. E. 363, 11 L.R.A. 413; State ex rel. White v. Grant Superior Ct. 202 Ind. 197, 172 N. E. 897, 71 A.L.R. 1354; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Election Comrs. v. Knight, 187 Ind. 108, 117 N. E. 565, 650, citing R. C. L.; Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; Re Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L.R.A. 489; State v. Sessions, 84 Kan. 856, 115 P. 641, Ann. Cas. 1912A, 796; State v. New Orleans R. & Light Co. 116 La. 144, 40 So. 597, 7 Ann. Cas. 724; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S. W. (2d) 131, citing R. C. L.; Johnson v. Great Falls, 38 Mont. 369, 99 P. 1059, 16 Ann. Cas. 974; Watson v. State, 109 Neb. 43, 189 N. W. 620, citing R. C. L.; State ex rel. Miller v. Lani, 55 Nev. 123, 27 P. (2d) 537 (rehearing denied in 55 Nev. 333, 29 P. (2d) 839), citing R. C. L.; Re Ming, 42 Nev. 472, 181 Pa. 319, 6 A.L.R. 1216; Killgrove v. Morriss, 39 Nev. 224, 156 P. 686, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; King & Queen County v. Cox, 155 Va. 687, 156 S. E. 755, citing R. C. L.; State Road Commission v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; State ex rel. Normal Schools v. Zimmerman, 183 Wis. 132, 197 N. W. 823, citing R. C. L.; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617; State v. Brown, 103 Vt. 312, 154 A. 579, 76 A.L.R. 1029.

"Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded." Re Ming, 42 Nev. 472, 181 P. 319, 6 A.L.R. 1216.

A practical construction by Congress of a provision of the Constitution is entitled to great weight especially in the absence of anything averse to it in the discussions of the Conventions which framed and ratified the Constitution. Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

An exposition of the Constitution of the United States deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly regarded. M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

4 Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983.

5 People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890.

6 State ex rel. Capitol Addition Bldg. Commission v. Connelly, 39 N. M. 312, 46 P. (2d) 1097, 100 A.L.R. 878; State v. Brown, 103 Vt. 312, 154 A. 579, 76 A.L.R. 1029.

enactments of the legislature of state-wide concern as shall, with uniformity, affect every city or every village, is, even if not controlling on the courts, entitled to great weight by reason of the considerations of public policy involved.[7] Legislative interpretation of a constitutional provision has controlling persuasiveness only in case the provision is of doubtful meaning and is of no force where no doubt exists.[8]

In cases where this doctrine may be properly invoked, the legislative interpretation should not be departed from unless manifestly erroneous,[9] but if the legislature clearly misinterprets a constitutional provision, the frequent repetition of the wrong will not create a right.[10]

In employing the general principle, it may be stated generally that any exercise of power by the legislature, which for a long time has passed unchallenged, must be deemed to have been approved by the people, unless forbidden by some subsequent constitutional provision.[11] A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered as matters within legislative control.[12] Thus, the rule has been laid down that the exercise by the legislature of the power of appointment to offices created by it since the adoption of the Constitution, which exercise has been acquiesced in by every department of the government and has never been questioned, amounts to a contemporaneous construction which is entitled to great weight.[13] Other examples of the rule are numerous. Long-continued practice of the legislature in raising money by taxation for particular purposes is of great weight on the question of the validity of legislation exercising the power of taxation for a similar purpose.[14] Similarly, it has been said that the fact that Congress frequently from the beginning of the government has exercised a certain power, such as enacting laws which are made to take effect or which are suspended upon the ascertainment of certain facts by the President, is a matter entitled to weight in determining the validity of such legislation.[15] The practical construction of the state Constitution by the general assembly, continued for seventy-six years, in counting Sundays as part of the period within which the general assembly may lawfully be in session has great weight with the court in determining whether Sunday may be counted to make one of the two days next previous to the final adjournment of the general assembly when a bill may be presented to the governor.[16]

The courts have expressed the opinion that the general principle under discussion is especially applicable to those matters which are political in their nature, such as the creating and regulation of municipal corporations, and that in such matters when the legislative branch of the government has adopted a construction which has been acquiesced in, the courts will generally accept and adopt such construction.[17] The reason is apparent. Official action in the case of constitutional provisions involving the exercise of political rights is subject to constant and careful scrutiny and is peculiarly proper as an aid to removing doubt as to the meaning of a provision in such cases.[18]

There are limitations within which this general rule must be exercised. The Supreme Court points out that the weight of congressional legislation to support or change a particular construction of the Constitution by acquiescence must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded.[19] Moreover, the passage of similar acts by other legislatures is insufficient to determine the validity of a statute clearly within the words of a constitutional prohibition.[20]

2. Acquiescence

§ 80. **In Interpretation.**—A practical construction acquiesced in for many years, although not truly contemporaneous with the adoption of the Constitution, is frequently resorted to in interpreting its provisions[1] and may be sufficient to demonstrate that powers conferred by a statute are not inconsistent with the provisions of the fundamental law.[2] The established practical construction of a constitutional provision should not be disregarded unless the terms of the provision furnish clear and definite support for a contrary construction.[3]

It has been said that where the practical construction of an ambiguous law by administrative officers is continued without interruption for a very long period, particularly if so long as fifty years, it is entitled to controlling weight,[4] and that the concurrence of statesmen, legislators, and judges in the same construction may justly inspire confidence in such construction of the Constitution.[5] Early and long-continued usage amounting to a practical construction of the constitutional provision prescribing the jurisdiction of the Supreme Court of

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[7] Van Gilder v. Madison, 222 Wis. 58, 267 N. W. 25, 268 N. W. 108, 105 A.L.R. 244.

[8] Peabody v. Russel, 302 Ill. 111, 134 N. E. 150, 20 A.L.R. 972; State ex rel. Capitol Addition Bldg. Commission v. Connelly, 39 N. M. 312, 46 P. (2d) 1097, 100 A.L.R. 878.

[9] Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Laird v. Sims, 16 Ariz. 521, 147 P. 738, L.R.A.1915F, 519; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Davison v. Johonnot, 7 Met. (Mass.) 388, 41 Am. Dec. 448; State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S. W. (2d) 131, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; King & Queen County v. Cox, 155 Va. 687, 156 S. E. 755, citing R. C. L.; State Road Commission v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272; State ex rel. Normal Schools v. Zimmerman, 183 Wis. 132, 197 N. W. 823, citing R. C. L.

[10] Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482.

[11] Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; Denison v. Municipal Gas Co. (Tex. Civ. App.) 257 S. W. 616 (affirmed in 117 Tex. 291, 3 S. W. (2d) 794), citing R. C. L.; State ex rel. Normal Schools v. Zimmerman, 183 Wis. 132, 197 N. W. 823, citing R. C. L.

[12] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723.

[13] Biggs v. McBride, 17 Or. 640, 21 P. 878, 5 L.R.A. 115.

[14] State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

[15] Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495.
Annotation: 79 L. ed. 487.

[16] State ex rel. White v. Grant Superior Ct. 202 Ind. 197, 172 N. E. 897, 71 A.L.R. 1354.

[17] State v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L.R.A. 523; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

[18] Smiley v. Holm, 285 U. S. 355, 76 L. ed. 795, 52 S. Ct. 397.

[19] Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480; Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21.

[20] Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

[1] Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Ex parte Crump, 10 Okla. Crim. Rep. 133, 135 P. 428, 47 L.R.A.(N.S.) 1036.
A uniform practice for a great number of years with respect to the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage will be held to settle the construction of the Constitution in that regard. Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627.

[2] Miller v. Enterprise Canal & Land Co. 142 Cal. 208, 75 P. 770, 100 Am. St. Rep. 115; Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. R. Co. 179 Ind. 356, 101 N. E. 296, 44 L.R.A.(N.S.) 816, Ann. Cas. 1915D, 917; State ex rel. Brewster v. Knapp, 99 Kan. 852, 163 P. 181, L.R.A. 1917C, 1034; State v. Grey, 21 Nev. 378, 32 P. 190, 19 L.R.A. 134; Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L.R.A. 315.
Practical construction of a constitutional provision is entitled to great weight in considering the validity of a statute thereunder. Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L.R.A.(N.S.) 415.

[3] Smiley v. Holm, 285 U. S. 355, 76 L. ed. 795, 52 S. Ct. 397.

[4] State v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019.

[5] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648.

the United States requires that the answering by it of questions certified be regarded as an exercise of appellate jurisdiction.[6]

One important application of the principle of acquiescence as fixing the interpretation of a Constitution is found in reference to the exercise of powers. The general rule is that the exercise of powers and general acquiescence therein for a long period of years, especially if commencing with the organization of the government, may be treated as fixing the construction of the Constitution and as amounting to a contemporary and practical exposition of it.[7]

On the other hand, it has been thoroughly established that acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it. It has been shrewdly pointed out that a power is frequently yielded to merely because it is claimed and that it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against appearing or without anyone being sufficiently interested in the subject to raise the question. Such circumstances cannot be allowed to sanction a clear infraction of the Constitution.[8] The rule of practical construction is of no value in construing a Constitution when it is plain that the practice has been in open violation of that instrument.[9] The fact that a holding that the governor of the state has no power to sign bills more than three days after adjournment of the legislature, contrary to a practical construction of the controlling constitutional provision, will void many special laws under which corporations and individuals have trustfully acted will not preclude the court from so holding, where it believes that the Constitution should be so interpreted.[10]

A corresponding application of these principles is found in the established rule that nonuser will not defeat a power to exercise rights expressly delegated in a written Constitution.[11] Similarly, it has been held that inaction on the

[6] Wheeler Lumber Bridge & Supply Co. v. United States, 281 U. S. 572, 74 L. ed. 1047, 50 S. Ct. 419.

[7] United States v. Curtiss-Wright Export Corp. 299 U. S. 304, 81 L. ed. 255, 57 S. Ct. 216; Pocket Veto Case (Okanogan Indians v. United States) 279 U. S. 655, 73 L. ed. 894, 49 S. Ct. 463, 64 A.L.R. 1434; McGrain v. Daugherty, 273 U. S. 135, 71 L. ed. 580, 47 S. Ct. 319, 50 A.L.R. 1; Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21; Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131; United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 S. Ct. 309; Paddell v. New York, 211 U. S. 446, 53 L. ed. 275, 29 S. Ct. 139, 15 Ann. Cas. 187; The Laura (Pullock v. Bridgeport S. B. Co.) 114 U. S. 411, 29 L. ed. 147, 5 S. Ct. 881; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 S. Ct. 279; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. ed. 535; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; Stuart v. Laird, 1 Cranch (U. S.) 299, 2 L. ed. 115.

A long-continued practical construction by Congress of powers under the provisions of the Constitution should be taken as fixing the meaning of such provisions. McGrain v. Daugherty, 273 U. S. 135, 71 L. ed. 580, 47 S. Ct. 319.

A contemporaneous legislative exposition of the Constitution when the founders of our government and the framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions. Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21.

Upon questions of constitutional law, the long-settled habits of the community play a part as well as grammar and logic. Paddell v. New York, 211 U. S. 446, 53 L. ed. 275, 29 S. Ct. 139.

[8] Re Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L.R.A. 489, writ of error dismissed in 189 U. S. 505, 47 L. ed. 921, 23 S. Ct. 851; Pingree v. Auditor Gen. 120 Mich. 95, 78 N. W. 1025, 44 L.R.A. 679; State v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548; Hamann v. Heekin, 88 Ohio St. 207, 102 N. E. 730, Ann. Cas. 1915A, 1058; State v. Beacon, 66 Ohio St. 491, 64 N. E. 427, 90 Am. St. Rep. 599; Harrison v. Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A.L.R. 465.

[9] Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

[10] State v. McCook, 109 Conn. 621, 147 A. 126, 64 A.L.R. 1453.

[11] McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587.

part of the legislature, however long continued, cannot confer legislative functions upon the judiciary.[12]

In order that the doctrine of practical construction through acquiescence be applied, the construction must also measure up to other requirements in addition to not amounting to unconstitutional usurpation. It must have been in effect long enough to have become established and fixed. Thus, a practice of governors of a state, for a period of nine years, to sign bills more than three days after final adjournment of the legislature is not so long settled and established as to have weight with the court when called upon to determine its conformity to the requirements of the state Constitution as to approval or return of bills, especially where, during the forty-two years preceding, this was an extremely infrequent occurrence.[13] The construction must also have received judicial acquiescence. For instance, although the uninterrupted practice of the government, prevailing through a long series of years with the acquiescence of all departments, settles a constitutional interpretation in accordance with such long-continued practice, the failure of the judicial department to acquiesce destroys the effect of an alleged practical construction of a constitutional provision.[14] Furthermore, the construction must have related to the matter at hand and must have covered the same contingencies which may arise in the instant situation. For example, adoption by the legislature on previous occasions of resolutions undertaking to authorize investigating committees to confer immunity on witnesses testifying before them is of little significance as evidence of a practical construction of the powers of the legislature, where there is no evidence of an attempt during such investigation to compel a witness to testify against his protest.[15]

§ 81. **In Constitutionality of Statutes.**—While long acquiescence in the constitutionality of a statute may properly be considered in determining its validity in a doubtful case, it cannot prevent inquiry into the constitutionality of the statute on the theory of estoppel, nor does it suffice to validate a statute which is clearly unconstitutional.[16] The fact that a statute has been construed and applied for a considerable period of time does not necessarily render it free from constitutional attack.[17] Acquiescence in an unconstitutional statute for many years will not render it valid.[18] Similarly, contemporaneous construction of a statute is of no weight, where its repugnancy to the Constitution is apparent.[19] It is not the province or practice of courts to seek out constitutional defects, and the fact that an act has been before the courts of last resort and has been construed and enforced is not conclusive of its constitutionality, when such question has never been expressly determined.[20] On the other hand, the courts

[12] Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

[13] State v. McCook, 109 Conn. 621, 147 A. 126, 64 A.L.R. 1453.

[14] Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A.L.R. 465.

As to the same principle in ascertaining the efficacy of contemporaneous legislative construction, see supra, § 79.

[15] Re Doyle, 257 N. Y. 244, 177 N. E. 489, 87 A.L.R. 418.

[16] Continental Oil Co. v. Twin Falls, 49 Idaho, 89, 286 P. 353, citing R. C. L.; Forbes v. Hubbard, 348 Ill. 166, 180 N. E. 767, citing R. C. L.; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; Arnsperger v. Crawford, 101 Md. 247, 61 A. 413, 70 L.R.A. 497; Kucker v. Sunlight Oil & Gasoline Co. 230 Pa. 528, 79 A. 747, Ann. Cas. 1912A, 503.

Annotation: 16 Ann. Cas. 878; Ann. Cas. 1912A, 505.

[17] People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890.

[18] Hamann v. Heekin, 88 Ohio St. 207, 102 N. E. 730, Ann. Cas. 1915A, 1058.

[19] Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552.

[20] Boyd v. Alabama, 94 U. S. 645, 24 L.

may properly recognize the serious results which would follow from a decision that a law is unconstitutional, where during a long period of acquiescence in its validity rights have become vested in reliance upon it.[1] In one jurisdiction the court has gone to the extent of declaring that under the doctrine of stare decisis, when a decision of a court of last resort determining the constitutionality of a statutory provision has been acquiesced in by the legislature and the people for a considerable period of time, and rights and interests have become settled thereunder, and no apparent beneficial result will be obtained by overruling such decision, the court will steadfastly decline to reopen the question as to constitutionality.[2]

3. Age of, or Time of Adoption of, Statutes

§ 82. Early Statutes and Individual Views.—The principle recognizing a contemporaneous construction as a legitimate argument in favor of the constitutionality of a statute has been applied to laws enacted by the legislature in the sessions immediately following the adoption of a new Constitution, in which case it frequently occurs that the members of the legislature are in part those who assisted in drafting the Constitution itself.[3] The contemporaneous construction of a state Constitution by the first legislature assembling after its adoption is of great weight.[4] In approving this principle, the courts have even referred to the opinions of well-known individual members of the legislature [5] and to the recognized legal ability of those who have been governors and have thus had a share of legislative power.[6]

Laws enacted during the period when the framers of a Constitution were actively participating in public affairs may be treated as clearly approved by those who, as members of Congress or of a state legislature, were in effect giving a practical construction to the Constitution which they had helped to establish.[7] Accordingly, it has been recognized that this amounts to a contemporaneous exposition of the Constitution within the meaning of the general

ed. 302; Kucker v. Sunlight Oil & Gasoline Co. 230 Pa. 528, 79 A. 747, Ann. Cas. 1912A, 503; State v. Nashville Baseball Club, 127 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1914B, 1243.

[1] Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A. 1916A, 696, Ann. Cas. 1916E, 1097; Home Teleph. Co. v. People's Teleph. & Teleg. Co. 125 Tenn. 270, 141 S. W. 845, 43 L.R.A. (N.S.) 550; State v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L.R.A. 523; Keetch v. Cordner, — Utah, —, 62 P. (2d) 273, 108 A.L.R. 52.

Annotation: 16 Ann. Cas. 878.

[2] Walling v. Bown, 9 Idaho, 740, 76 P. 318, 2 Ann. Cas. 720.

[3] J. W. Hampton Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 S. Ct. 279; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; Bank of Newport v. Cook, 60 Ark. 288, 30 S. W. 35, 29 L.R.A. 761, 46 Am. St. Rep. 171; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139.

[4] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 S. Ct. 739.

The legislative construction given by the Arizona Public Service Corporation Act, enacted at the first session of the Arizona legislature, to the words "corporations" and "public service corporations" in Ariz. Const. Art. 15, creating a Corporation Commission with broad powers of regulation, as embracing a water system owned by an individual, will be followed by the Federal Supreme Court, in the absence of an authoritative decision of the Arizona Supreme Court to the contrary, notwithstanding the provision of Art. 14 of such Constitution, defining "corporation" as used in such article as including all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or copartnerships—especially since the legislature was empowered by Ariz. Const. Art. 15, § 6, to enlarge the powers and extend the duties of the Corporation Commission. Van Dyke v. Geary, 244 U. S. 39, 61 L. ed. 973, 37 S. Ct. 483.

[5] French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113.

[6] Ibid.

[7] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648.

principle, and that in doubtful cases the courts may give considerable weight to it in upholding the constitutionality of such statutes.[8] The Judiciary Act of 1789, passed by a Congress among the members of which were many who had participated in the convention which framed the Constitution, is a contemporaneous exposition of the highest authority.[9]

§ 83. Age of Statutes or State Constitutional Provisions.—The length of time that a statute has stood without any attacks on constitutional grounds is a factor which sometimes influences the court in upholding its constitutionality.[10] The question of constitutionality cannot, however, be regarded as settled if the question has never been raised in the courts.[11] The presumption of validity which applies to legislation generally is fortified by acquiescence through a number of years.[12] The fact that for a period of eighty-two years the constitutionality of a statute considered in many cases by the highest court of the state has not been questioned is persuasive, if not convincing, evidence of its validity.[13] This principle has also been applied in the upholding of statutes the constitutionality of which was not attacked until after sixty years,[14] nearly sixty years,[15] fifty years,[16] forty-five years,[17] forty years,[18] thirty years,[19] nearly a quarter of a century,[20] and even twenty years.[1] It has been said that a construction which has for a third of a century been accepted by everyone as so obviously correct as never to have been questioned is much more likely to be right than a newly discovered one suggested by the emergencies of current litigation.[2]

This principle has also been applied in testing the validity of a state constitutional provision at the time the question as to its consistency with the Federal Constitution is raised.[3]

[8] Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; State v. New Orleans R. & Light Co. 116 La. 144, 40 So. 597, 7 Ann. Cas. 724.

[9] Williams v. United States, 289 U. S. 553, 77 L. ed. 1372, 53 S. Ct. 751; Patton v. United States, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 S. Ct. 580; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 S. Ct. 1370, overruled on other grounds in Milwaukee County v. White Co. 296 U. S. 268, 80 L. ed. 220, 56 S. Ct. 229; Börs v. Preston, 111 U. S. 252, 28 L. ed. 419, 4 S. Ct. 407; People ex rel. Watseka Teleph. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636.

[10] McElvain v. Mudd, 44 Ala. 48, 4 Am. Rep. 106; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Eames v. Savage, 77 Me. 212, 52 Am. Rep. 751; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

Annotation: 16 Ann. Cas. 879.

[11] See supra, § 49.

[12] Life & C. Ins. Co. v. Barefield, 291 U. S. 575, 78 L. ed. 999, 54 S. Ct. 486; Life & C. Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987, 54 S. Ct. 482; Corn Exch. Bank v. Coler, 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94; Ownbey v. Morgan, 256 U. S. 94, 65 L. ed. 837, 41 S. Ct. 433, 17 A.L.R. 873.

As to the general presumption of constitutionality of statutes, see infra, § 128.

[13] Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917.

[14] McPherson v. Blacker, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587; Mapel v. John, 42 W. Va. 30, 24 S. E. 608, 32 L.R.A. 800, 57 Am. St. Rep. 839.

[15] Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381.

[16] Hill v. Tohill, 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423; Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

[17] Udell v. Citizens' Street R. Co. 152 Ind. 507, 52 N. E. 799, 71 Am. St. Rep. 336; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L.R.A. 337.

[18] Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174, 46 N. E. 77, 37 L.R.A. 189; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; Swift v. Colnan, 102 Iowa, 206, 71 N. W. 233, 37 L.R.A. 462, 63 Am. St. Rep. 443; Way v. Barney, 116 Minn. 285, 133 N. W. 801, 38 L.R.A.(N.S.) 648, Ann. Cas. 1913A, 719.

[19] Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 S. Ct. 211, affirming 28 Mont. 222, 72 P. 617, 104 Am. St. Rep. 683.

[20] Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 65 N. W. 652, 31 L.R.A. 553.

[1] Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 65 N. W. 652, 31 L.R.A. 553.

[2] Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L.R.A. 281, 31 Am. St. Rep. 626.

[3] Way v. Barney, 116 Minn. 285, 133 N.

It should be borne in mind that mere long usage and practical interpretation cannot control in the interpretation of the Constitution, unless the language is obscure and doubtful.[4] Such usage and interpretation are entitled to no weight if the statutes are in conflict with the plain meaning of the Constitution.[5]

4. Other Extrinsic Aids to Construction

§ 84. Reference to Proceedings of Conventions and Debates.—Under the principle that a judicial tribunal, in interpreting ambiguous provisions, may have recourse to contemporaneous interpretations so as to determine the intention of the framers of the Constitution,[6] the rule is well established that in the construction of the Constitution of the United States recourse may be had to proceedings in the convention which drafted that instrument.[7] The same is true with reference to the proceedings of state constitutional conventions.[8] This rule has likewise been applied to debates in Congress upon the form and

W. 801, 38 L.R.A.(N.S.) 648, Ann. Cas. 1913A, 719.

4 Stumpf v. Storz, 156 Mich. 228, 120 N. W. 618, 23 L.R.A.(N.S.) 152, 132 Am. St. Rep. 521; State v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548.

5 Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567; Hamann v. Heekin, 88 Ohio St. 207, 102 N. E. 730, Ann. Cas. 1915A, 1058; Kucker v. Sunlight Oil & Gasoline Co. 230 Pa. 528, 79 A. 747, Ann. Cas. 1912A, 503; Kingsley v. Merrill, 122 Wis. 185, 99 N. W. 1044, 67 L.R.A. 200, 2 Ann. Cas. 748.

6 See supra, §§ 78 et seq.

7 Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 39 S. Ct. 93, 2 A.L.R. 1589; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 S. Ct. 331; Income Tax Cases (Pollock v. Farmer's Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; State v. Sessions, 84 Kan. 856, 115 P. 641, Ann. Cas. 1912A, 796; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; Keating v. Spink, 3 Ohio St. 105, 62 Am. Dec. 214; State v. Carew, 47 S. C. L. (13 Rich.) 498, 91 Am. Dec. 245; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567.

Annotation: 70 A.L.R. 11, 32.

What went before the adoption of the United States Constitution may be resorted to for the purpose of throwing light on its provisions. Marshall v. Gordon, 243 U. S. 521, 61 L. ed. 881, 37 S. Ct. 448, L.R.A. 1917F, 279, Ann. Cas. 1918B, 371.

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption may properly be taken into consideration for the purpose of tracing to its source any particular provision of the Constitution in order thereby to be enabled to interpret its meaning correctly. Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

In construing the Constitution, the court is at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other. Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673.

8 Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Norwalk Street R. Co.'s Appeal, 69 Conn. 516, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Butts County v. Jackson Bkg. Co. 129 Ga. 801, 60 S. E. 149, 15 L.R.A.(N.S.) 567, 121 Am. St. Rep. 244; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Re Denny, 156 Ind. 104, 59 N. E. 359, 51 L.R.A. 722; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; Com. v. International Harvester Co. 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; Bonsal v. Yellott, 100 Md. 481, 60 A. 593, 69 L.R.A. 914; Bradford Constr. Co. v. Heflin, 88 Miss. 314, 42 So. 174, 12 L.R.A.(N.S.) 1040, 8 Ann. Cas. 1077; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; Sherill v. O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; People ex rel. McClelland v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L.R.A. 399; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Cooper v. Utah Light & R. Co. 35 Utah, 570, 102 P. 202, 136 Am. St. Rep. 1075; Sanipoli v. Pleasant Valley Coal Co. 31 Utah, 114, 86 P. 865, 10 Ann. Cas. 1142; Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L.R.A.(N.S.) 121, 9 Ann. Cas. 711; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

Annotation: 70 A.L.R. 11, 32; 10 Ann. Cas. 1147.

The facts that authors of judicial opinions construing a state Constitution were members of the convention by which such Constitution was framed and that the opinions were filed only a short time after the adoption of the Constitution give such opinions great weight. Riley v. Carter 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

effect of proposed amendments to the Constitution of the United States,[9] and even to debates and legislative reports bearing upon constitutional provisions which have recently taken effect in a state.[10]

It is generally recognized that debates of a constitutional convention are of only limited value as explaining doubtful phrases, and that they may be an unsafe guide.[11] The opinions of the individual members of a convention expressed during the debate, although they are occasionally referred to,[12] are seldom considered as of material value as expressions of the view of the convention as a whole.[13] The question in interpreting a Constitution is not so much how it was understood by its framers as how it was understood by the people adopting it,[14] since the Constitution derives its force as a fundamental law, not from the action of the convention, but from the people who have ratified and adopted it.[15] Accordingly, debates of a convention are not considered as of controlling weight upon the construction of constitutional provisions[16] and can never be resorted to for the purpose of overruling a plain and unambiguous provision.[17] They are not without importance, however, where they tend to support a construction indicated by the language of the instrument,[18] and they may clearly show what was the mischief which it was intended to prevent under the new order of things by adopting an amendment to the fundamental law.[19]

9 United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456.

Annotation: 70 A.L.R. 21.

The intention of the Congress which framed, and of the states which adopted, an amendment to the Constitution must be sought in the words of the amendment, and the debates in Congress are not admissible as evidence to control the meaning of those words, although they are valuable as contemporaneous opinions upon the legal meaning of the words themselves. United States v. Wong Kim Ark, 169 U. S. 649, 52 L. ed. 890, 18 S. Ct. 456.

10 People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; McPherson v. Blacker, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587, affirmed in 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3.

Annotation: 70 A.L.R. 21, 32.

11 State ex rel. Russell v. State Highway Commission, 328 Mo. 942, 42 S. W. (2d) 196, citing R. C. L.; Rasmussen v. Baker, 7 Wyo. 117, 50 P. 819, 38 L.R.A. 773.

Annotation: 70 A.L.R. 30 et seq.

"The history of the calling of the convention, the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention." Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 387.

12 State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551.

13 Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494.

Concerning the question as to whether members of a constitutional convention may testify or furnish evidence as to what was intended by the constitutional provision the construction of which is involved, one court has approved the doctrine that it cannot resort to opinions of individual members of a constitutional body on questions of construction. An attempt was made to show, by letters from eminent members of a constitutional convention, that in their opinion the convention intended to accomplish a certain result. Annotation: 70 A.L.R. 6.

14 Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

15 Butts County v. Jackson Bkg. Co. 129 Ga. 801, 60 S. E. 149, 15 L.R.A.(N.S.) 567, 121 Am. St. Rep. 244; People ex rel. Watseka Teleph. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; State ex rel. Russell v. State Highway Commission, 328 Mo. 942, 42 S. W. (2d) 196, citing R. C. L.; Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567; Sanipoli v. Pleasant Valley Coal Co. 31 Utah, 114, 86 P. 865, 10 Ann. Cas. 1142.

16 United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 S. Ct. 456; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

17 People ex rel. Watseka Teleph. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; Steele, H. & M. Co. v. Miller, 92 Ohio St. 45, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515.

Annotation: 70 A.L.R. 15, 16, 32; 10 Ann. Cas. 1147.

Debates and proceedings in a constitutional convention are not admissible to control the construction of the plain language of the Constitution or narrow down the powers which that instrument confers. Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287 (per Field, J., dissenting).

18 Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; State ex rel. Cope v. Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L.R.A. 422.

Annotation: 70 A.L.R. 34.

19 State v. Camp Sing, 18 Mont. 128, 44

Debates in a convention may also be of material assistance in showing that a word or clause was used in a certain sense by the framers of the instrument.[20] Thus, it has been said that the debates in the Federal Constitutional Convention upon the Constitution show that the term "ex post facto laws" was understood in a restricted sense, relating to criminal cases only, and that the description by Blackstone of such laws was the one which the framers had in mind.[1]

The authorities indicate that the reports of committees in a constitutional convention may be resorted to for the purpose of ascertaining the intent of the framers of a constitutional provision of ambiguous or doubtful meaning.[2]

It has been said that the arguments of individual legislators may on occasions be so influenced by personal or political considerations or by the assumed exigencies of the situation that they may not even be the deliberate views of the persons who make them and are therefore considered as being of very little weight as furnishing ground for the construction to be put upon the Constitution by the courts.[3]

Other matters connected with the adoption or submission of proposed amendments are often considered by the courts. It has been held that in construing the provisions of a Constitution, the court may consider the printed arguments for and against the provision submitted to the people at the polls.[4] In many cases amendments of a proposed constitutional provision and changes made therein during the course of passage in the constitutional convention, as disclosed by the records of the convention, have been considered by the courts in interpreting language in the measure as finally enacted which was of doubtful or ambiguous meaning.[5] In the determination of the meaning of a state Constitution it is also proper to consider the fact that the convention considered the insertion of a particular provision and then determined to omit it.[6] Even the rejection by a convention of amendments to drafts of a constitutional provision may not be conclusive on the interpretation. The authors of the amendments may have believed it best to put their views beyond any question, and this desire may have been met by the counter opinion that no other construction could be placed upon the provision in question and that therefore the amendments were needless and superfluous.[7] Concerning the effect of rejections on construction, the final test is, of course, the vote of the people. The rejection of proposed amendments by the people when submitted to them for adoption is significant of their intentions on the subject matter contained in the proposed amendments, regardless of what may be the correct deduction to be drawn from the debates in the constitutional convention.[8]

P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Peninsular Lead & Color Works v. Union Oil & Paint Co. 100 Wis. 488, 76 N. W. 359, 42 L.R.A. 331, 69 Am. St. Rep. 934.

[20] Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Bishop v. State, 149 Ind. 223, 48 N. E. 1038, 39 L.R.A. 278, 63 Am. St. Rep. 279; Sanipoli v. Pleasant Valley Coal Co. 31 Utah, 114, 86 P. 865, 10 Ann. Cas. 1142.

Annotation: 10 Ann. Cas. 1147.

[1] Carpenter v. Pennsylvania, 17 How. (U. S.) 456, 15 L. ed. 127.

[2] Annotation: 70 A.L.R. 41.

[3] Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 S. Ct. 770; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 S. Ct. 540.

[4] Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750.

[5] Annotation: 70 A.L.R. 22.

[6] Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270.

Annotation: 70 A.L.R. 25.

A clause stricken from a Constitution may be referred to as an aid in the construction of the remaining clauses with which it was originally associated. Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

[7] McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567.

[8] Williams v. State, 81 N. H. 341, 125 A. 661, 39 A.L.R. 490.

§ 85. The Federalist and Opinions of Writers.—Under the rule that contemporaneous construction may be referred to, it is an accepted principle that in the interpretation of the Constitution of the United States recourse may be had to the Federalist,[9] since the papers included in that work were the handiwork of three eminent statesmen two of whom had been members of the convention which framed the Constitution. Accordingly, frequent references have been made to these papers in opinions considering constitutional questions,[10] and they have sometimes been accorded considerable weight.[11]

For the contemporaneous construction in addition to the writings in the Federalist, recourse is occasionally had to other unofficial discussions and expositions. It has been said that any opinions expressed in the community—especially near the time of the adoption of the Constitution—by judges and jurists or by statesmen, or any inferences which may properly be drawn, either from what they said or what they omitted to say, may in proper cases be considered in arriving at a correct interpretation of the fundamental law.[12] Thus, a statement made by an acknowledged leader of the advocates of a measure incorporated in a Constitution may be accepted as an authoritative declaration of its scope and effect, even though the author of the statement was not himself a member of the convention.[13] In reference to the Federal Constitution similar recourse has been had to opinions expressed in certain legal briefs prepared by Alexander Hamilton.[14] Finally, it may be mentioned that arguments as to the proper construction of constitutional provisions have been drawn from the mere silence of eminent writers on constitutional law and their failure to discuss plausible views as to the meaning of such provisions.[15]

VI. CONSTITUTIONALITY OF STATUTES

A. Power to Declare Statutes Void

1. Nature of Power and Duty

§ 86. Fundamental Principles.—It is a principle in the English law that an act of Parliament delivered in clear and intelligible terms cannot be questioned or its authority controlled in any court of justice.[16] Although the doctrine was not established without dispute, it is now a settled principle of the American system of constitutional law that the courts have inherent authority to determine whether statutes enacted by the legislature transcend the limits imposed

[9] M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

[10] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Pollock v. Farmers Loan & T. Co. 158 U. S. 627, 39 L. ed. 1108, 15 S. Ct. 912; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; New Orleans v. Eclipse Tow-Boat Co. 33 La. Ann. 647, 39 Am. Rep. 279; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Keating v. Spink, 3 Ohio St. 105, 62 Am. Dec. 214; Gunn v. Union R. Co. 27 R. I. 320, 62 A. 118, 2 L.R.A.(N.S.) 362; Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597.

[11] Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

[12] Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597.

[13] Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

[14] Springer v. United States, 102 U. S. 586, 26 L. ed. 253.

In United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914, the Supreme Court, in deliberating upon the power of Congress to appropriate funds "for the general welfare of the United States," considered the views of both Alexander Hamilton and James Madison as to the meaning and interpretation of the phrase of the Constitution concerning this question and adopted the view suggested by Hamilton as the correct interpretation. See also Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319 (Social Security Act of 1935).

[15] Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597.

[16] Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A.(N.S.) 244, 20 Ann. Cas. 158.

by the Federal and state Constitutions and to determine whether such laws are or are not constitutional.[17] The determination of the constitutionality of a stat-

[17] **United States.**—United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; McCrary v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Nashville v. Cooper, 6 Wall. 250, 18 L. ed. 852; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Hamilton Bank v. Dudley, 2 Pet. 492, 7 L. ed. 496; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60 (the leading case).

Alabama. — Dyer v. Tuskaloosa Bridge Co. 2 Port. 296, 27 Am. Dec. 655.

Connecticut. — Derby Turnp. Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700; Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Delaware. — Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. 389, 44 Am. Dec. 593.

Florida.—State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

Georgia. — Denham v. Holemann, 26 Ga. 182, 71 Am. Dec. 198; Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379.

Illinois. — People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A. (N.S.) 893.

Indiana. — Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; State ex rel. Brown v. Bailey, 16 Ind. 46, 79 Am. Dec. 405.

Iowa. — Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

Kansas. — Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325.

Kentucky. — Bliss v. Com. 2 Litt. 90, 13 Am. Dec. 251.

Louisiana. — Johnson v. Duncan, 3 Mart. 530, 6 Am. Dec. 675.

Maine. — Bowdoinham v. Richmond, 6 Me. 112, 19 Am. Dec. 197.

Massachusetts. — Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A. (N.S.) 241, 133 Am. St. Rep. 276; King v. Dedham Bank, 15 Mass. 447, 8 Am. Dec. 112; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

Missouri. — Greene County v. Lyday, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310.

Nebraska. — Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N. W. 551, citing R. C. L.; Searle v. Yenson, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 957.

New York. — Sherrill v. O'Brien, 188 N. Y. 185, 81 N. E. 1176, 117 Am. St. Rep. 841.

North Carolina. — State ex rel. Atty.-Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State v. Moore, 104 N. C. 714, 10 S. E. 142, 17 Am. St. Rep. 696; Den ex dem. University of North Carolina v. Foy, 5 N. C. (1 Murph.) 58, 3 Am. Dec. 672 (semble).

North Dakota. — State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 533, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Ohio.—State v. Robins, 71 Ohio St. 273, 73 N. E. 470, 69 L.R.A. 427, 2 Ann. Cas. 485.

Oklahoma. — State ex rel. Cruce v. Cease, 28 Okla. 271, 114 P. 251, Ann. Cas. 1912D, 151.

Pennsylvania. — Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272.

Tennessee. — Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Girdner v. Stephens, 1 Heisk. 280, 2 Am. Rep. 700; Tate v. Bell, 4 Yerg. 202, 26 Am. Dec. 221.

Utah. — Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A. 1918A, 1193; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

Vermont. — Starr v. Robinson, 1 D. Chip. 257, 6 Am. Dec. 732.

Virginia. — Carter v. Com. 96 Va. 791, 32 S. E. 780, 45 L.R.A. 310; Tuckahoe Canal Co. v. Tuckahoe & J. R. Co. 11 Leigh, 42, 36 Am. Dec. 374.

West Virginia. — Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; Harmison v. Ballot Comrs. 45 W. Va. 179, 31 S. E. 394, 42 L.R.A. 591; Price v. Moundsville, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878.

"The supremacy of the law requires that where enacted Constitutions form the fundamental law there be some authority which can pronounce whether the legislature itself has or has not transgressed it in the passing of some law, or whether a specific law conflicts with the superior law, the Constitution. If a separate body of men were established to pronounce upon the constitutionality of a law, nothing would be gained. It would be as much the creature of the Constitution as the legislature, and might err as much as the latter. Quis custodiet custodes? Tribunes or ephori? They are as apt to transgress their powers as other mortals. But there exists a body of men in all well-organized polities, who, in the regular course of business assigned to them, must decide upon clashing interests, and do so exclusively by the force of reason, according to law, without the power of armies, the weight of patronage or imposing pomp, and who, moreover, do not decide upon principles in the abstract, but upon practical cases which involve them—the middlemen between the pure philosophers and the pure men of government. These are the judges—courts of law." Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

By express provisions of the Constitution or by necessary inference and implication the judicial department of the government is competent to determine whether a given law of the United States is or

ute is within the especial province and duty of the courts.[18] Hence, if a statute is in violation of the fundamental law, it is not only the right, but the duty, of the judiciary to declare such act unconstitutional and void.[19] If the Constitution prescribes one rule and the law another and a different rule, it is the duty of the courts to declare that the Constitution, and not the law, governs in cases before them for judgment.[20] The power of construing the Constitution must necessarily be lodged in some department of the government to insure that practical sanction to its mandates which seems essential for the preservation of their vitality and force.[1] The courts have just as much power and right to in-

is not enacted pursuant to the Constitution and to pronounce it valid or void accordingly. Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673.

As to advisory opinions of courts to other departments, see COURTS.

For a classical discussion of the origin and scope of the American doctrine of constitutional law, treating the question of the power of the courts to declare laws unconstitutional, see the article by James B. Thayer, 7 Harvard L. Rev. 129.

[18] Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

[19] Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Nashville v. Cooper, 6 Wall. (U. S.) 251, 18 L. ed. 852; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; State v. Travelers' Ins. Co. 73 Conn. 255, 47 A. 299, 57 L.R.A. 481, affirmed in 185 U. S. 364, 46 L. ed. 949, 22 S. Ct. 673; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A. (N.S.) 126, 16 Ann. Cas. 1234; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L.R.A. 370, 22 Am. St. Rep. 624; Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524; Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

In Georgia the Constitution not only recognizes the necessary power of the courts to declare laws in violation of the state or Federal Constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void. Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A.1915B, 1097, Ann. Cas. 1916C, 280.

As to the force and extent of this obligatory duty, see infra, § 88.

[20] Dred Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State v. Wilson, 162 S. C. 413, 161 S. E. 104, 81 A.L.R. 580.

Where, in adjudicating litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law and renders it inoperative ab initio, so that the Constitution, and not the statute, will be applied by the court in determining the litigated rights. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

"'When laws conflict in actual cases, courts must decide which is the superior law and which must yield; since according to our principles every officer remains answerable for what he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the Constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The court, bound to do justice to everyone, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doings of the legislature. It simply decides, for the case in hand, whether there actually are conflicting laws, and, if so, which is the higher law that demands obedience when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until, indeed, proper and legitimate authority shall reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate, and safe manner, according to the principle of the supremacy of the law and the independence of justice. It is one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty, one of the best fruits of our political civilization.'" Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

[1] Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847.

"In no other way known to intelligent men can a government by written Constitution exist except there be power somewhere to make statutes square with that instrument, and to say whether or not they do. That high power is now lodged with the courts; there it has been for generations and there it must remain until the people by the exercise of their sovereign will, expressed in a constitutional

quire into the constitutionality of a statute adopted by the initiative method as they have with reference to statutes enacted by the legislature in the ordinary manner.[2]

In some of the states, by specific provisions inserted in the state Constitutions themselves by the people of the state, the otherwise unlimited power of the courts to declare statutes unconstitutional has been confined, limited, and made subject to restrictions and qualifications. An Ohio constitutional provision states that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges," except upon appeal from a court of appeals that has already held the law to be unconstitutional.[3] A more specific constitutional amendment, in reference to the state Supreme Court, that "in no case shall any legislative enactment or law of the state . . . be declared unconstitutional unless at least four of the judges shall so decide" (the court consisting of five judges), has been held to require that a certain act must be held to be constitutional where only two of the judges are satisfied that it is so and where the other two who participated in the case are of the opinion that it is invalid. Another act has been upheld under this amendment even though three of the five judges considered the act to be unconstitutional.[4]

§ 87. Power of the Several Departments of Government.—From the very nature of the American system of government with Constitutions prescribing the jurisdiction and powers of each of the three branches of government,[5] it has devolved on the judiciary to determine whether the acts of the other two departments are in harmony with the fundamental law.[6] All the departments of the government are unquestionably entitled and compelled to judge of the Constitution for themselves; but, in doing so, they act under the obligations im-

way, take it away and lodge it elsewhere." Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310.

[2] Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304.

[3] Annotation: 66 A.L.R. 1467.

The effect of the Ohio provision is to make it possible for a statute to be regarded as valid in one district, while at the same time it is invalid in another, and its validity is entirely conjectural in any of the other districts (there being nine in all) in which it has not come before the Court of Appeals. Perhaps the view may be taken that as soon as the majority of the Supreme Court has been able to give effect to its view that a statute is unconstitutional, the lower courts will be bound by that decision, so that the Supreme Court will not again be confronted by a case in which the constitutionality of the statute is upheld by the Court of Appeals. Ibid.

In Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460, it was held that neither the due process clause nor the equal protection clause of the Federal Constitution is violated by the Ohio constitutional provision to the effect that even the Supreme Court of that State cannot hold a statute to be unconstitutional where the Court of Appeals from which the case has been taken up has upheld its validity and more than one of the Supreme Court judges concur in that view.

In Colorado it had been held that a state Constitution cannot deny to the trial judges of the State power to determine whether or not the statutes of the State violate the Federal Constitution. People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326. Annotation: 15 A.L.R. 333.

The Colorado Supreme Court also has held that a constitutional provision authorizing the people of the State or of a municipality to recall a judicial decision holding a state statute or a municipal ordinance violative of the Federal Constitution is null and void. People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326. Annotation: 66 A.L.R. 1466.

This decision by the United States Supreme Court in Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A.L.R. 1460, would seem to destroy the force of the Colorado decisions so far, at least, as they have held that the limitations there in question upon the power of trial courts to declare statutes unconstitutional violate the same provisions of the Federal Constitution.

[4] Annotation: 66 A.L.R. 1468, 1469 (referring to constitution of North Dakota).

[5] See infra, §§ 180 et seq.

[6] Walling v. Bown, 9 Idaho, 740, 76 P. 318, 2 Ann. Cas. 720; Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; Denison v. State (Tex. Civ. App.) 61 S. W. (2d) 1017 (writ of error refused in 122 Tex. 459, 61 S. W. (2d) 1022) citing R. C. L.; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009.

posed in the instrument, and in the order of time pointed out by it. When the judiciary has once spoken, if the acts of the other two departments are held to be unauthorized or despotic, in violation of the Constitution or the vested rights of the citizen, they cease to be operative or binding.[7]

In a doubtful case, the final responsibility of passing upon the constitutionality of a statute rests upon the courts,[8] and they alone are by the organic law empowered authoritatively to declare or adjudge a statute to be in accord or in conflict with the Constitution, so that the statute, if valid, stands, or, if contrary to organic law, will, by the operation of the Constitution, be rendered invalid from its enactment.[9] It has been thoroughly stated that the right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution. The oath of office "to obey the Constitution," means to obey the Constitution, not as the officer decides, but as judicially determined, for since every law found on the statute books is presumptively constitutional until declared otherwise by the court, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement.[10]

In assuming this high function, the courts do not proceed on the theory that the judiciary is in any way superior to the two other co-ordinate departments, but solely on the theory that they are required to declare the law in every case coming before them and accordingly must enforce the Constitution as the paramount law whenever they find an act of the other departments in conflict with it.[11]

§ 88. Obligatory Duty of Courts.—Since the Constitution is intended for the observance of the judiciary as well as the other departments of government and the judges are sworn to support its provisions,[12] the courts are not at lib-

[7] McFarland v. State Bank, 4 Ark. 44, 37 Am. Dec. 761; State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; State ex rel. Suddoth v. Tann, 172 Miss. 162, 158 So. 777, 159 So. 539, citing R. C. L.; Denison v. State (Tex. Civ. App.) 61 S. W. (2d) 1017 (writ of error refused in 122 Tex. 459, 61 S. W. (2d) 1022) citing R. C. L.; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

[8] John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

[9] State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

[10] State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362.

Every law must be received and obeyed as the law until questioned and set aside by the courts. It cannot be questioned at the bar of private judgment. Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1462; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Under the provisions of the Rhode Island Constitution that the Supreme Court shall have final revisory and appellate jurisdiction upon all questions of law and equity, the constitutionality of a statute does not depend upon the construction placed upon it by a board of commissioners and it is presumed to be constitutional until the Supreme Court has decided otherwise. Payne & Butler v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

[11] Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Carter v. Com. 96 Va. 791, 32 S. E. 780, 45 L.R.A. 310; John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

[12] United States v. Fisher, 2 Cranch (U. S.) 396, 2 L. ed. 304; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242; Carr v. State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L.R.A. 370; University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; Pacific Live Stock Co. v. Ellison Ranching Co. 46 Nev. 351, 213 P. 700, citing R. C. L.; Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758, citing R. C. L.; State

erty to overlook or disregard its commands.[13] It is their duty in authorized proceedings to give effect to the existing Constitution[14] and to obey all constitutional provisions irrespective of their opinion as to the wisdom of such provisions.[15]

In accordance with principles which are basic, the rule is fixed that the duty in a proper case to declare a law unconstitutional cannot be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question.[16] When it is clear that a statute transgresses the authority vested in the legislature by the Constitution, it is the duty of the courts to declare the act unconstitutional because they cannot shrink from it without violating their oaths of office.[17] This

ex rel. Atty. Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410, overruled on another point in State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; Ex parte Meyer, 84 Tex. Crim. Rep. 288, 207 S. W. 100, citing R. C. L.; Thoe v. Chicago, M. & St. P. R. Co. 181 Wis. 456, 195 N. W. 407, 29 A.L.R. 1280.

[13] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; State use of Washington County v. Baltimore & O. R. Co. 12 Gill & J. (Md.) 399, 38 Am. Dec. 317, affirmed in 3 How. (U. S.) 534, 11 L. ed. 714; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Pacific Live Stock Co. v. Ellison Ranching Co. 46 Nev. 351, 213 P. 70, citing R. C. L.; Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758, citing R. C. L.; State ex rel. Atty. Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A. 1915F, 898, Ann. Cas. 1917D, 517; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A. (N.S.) 299, 14 Ann. Cas. 562; Kintz v. Harriger, 99 Ohio St. 240, 124 N. E. 168, 12 A.L.R. 1240; Ex parte Meyer, 84 Tex. Crim. Rep. 288, 207 S. W. 100, citing R. C. L.

[14] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

Courts must give effect to a constitutional amendment establishing a budget system for disbursement of state finances, and safeguard it wherever necessary. Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058.

[15] Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 S. Ct. 651; People ex rel. Moore v. Perkins, 56 Colo. 17, 137 P. 55, Ann. Cas. 1914D, 1154; Kentucky State Journal Co. v. Workmen's Comp. Bd. 161 Ky. 562, 162 Ky. 387, 170 S. W. 437, 1166, 172 S. W. 674, L.R.A.1916A, 389, Ann. Cas. 1916B, 1273; Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; Snodgrass v. State, 67 Tex. Crim. Rep. 615, 150 S. W. 162, 41 L.R.A.(N.S.) 1144.

The wisdom of a constitutional provision as to formalities of legislative procedure is not a matter of concern to either the legislature or the judiciary. Kavanaugh v. Chandler, 255 Ky. 182, 72 S. W. (2d) 1003, 95 A.L.R. 273.

[16] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914; McCrary v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Lane v. Dorman, 4 Ill. 238, 36 Am. Dec. 543; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706; Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; New Gloucester School Fund v. Bradbury, 11 Me. 118, 26 Am. Dec. 515; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758, citing R. C. L.; State ex rel. Atty. Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A. 1915F, 898, Ann. Cas. 1917D, 517; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Cincinnati v. Harth, 101 Ohio St. 344, 128 N. E. 263, 13 A.L.R. 308; Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1306.

[17] Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 66 L. ed. 818, 42 S. Ct. 449, 21 A.L.R. 1432; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; State ex rel. Crenshaw v. Joseph, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914D, 248; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Leonard v. Franklin, 84 Fla. 402, 93 So. 688, citing R. C. L. (concurring opinion); State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126,

duty of the courts to maintain the Constitution as the fundamental law of the state is imperative and unceasing;[13] and, as Chief Justice Marshall said, whenever a statute is in violation of the fundamental law, the courts must so adjudge and thereby give effect to the Constitution.[19] Any other course would lead to the destruction of the Constitution.[20] Since the question as to the constitutionality of a statute is a judicial matter, the courts will not decline the exercise of jurisdiction upon the suggestion that action might be taken by political agencies in disregard of the judgment of the judicial tribunals.[1]

The duty so cast is imposed upon all the courts to uphold both the Federal and state Constitutions. As the Supreme Court has stated, the duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.[2] Consequently, state courts, as well as Federal courts, are under an obligation to guard and enforce every right secured by the Federal Constitution;[3] and it is the duty of the state courts as much as of the Federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question and to hold the law void if it violates that instrument.[4] It

16 Ann. Cas. 1234; Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 712; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Atkinson v. Woodmansee, 68 Kan. 71, 74 P. 640, 64 L.R.A. 325; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A.1917B, 808; Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; State ex rel. Pollock v. Becker, 289 Mo. 660, 233 S. W. 641, citing R. C. L. (concurring opinion); Baily v. Gentry, 1 Mo. 164, 13 Am. Dec. 484; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; Pacific Live Stock Co. v. Ellison Ranching Co. 46 Nev. 351, 213 P. 700, citing R. C. L.; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 67 N. E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674, affirmed in 199 U. S. 1, 48, 53, 50 L. ed. 65, 79, 85, 25 S. Ct. 705, 713, 715; Southern R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758, citing R. C. L.; State ex rel. Atty. Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 533, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191; State ex rel. Weinberger v. Miller, 87 Ohio St. 12, 99 N. E. 1078, 44 L.R.A.(N.S.) 712, Ann. Cas. 1913E, 761; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; State ex rel. Richards v. Armstrong, 17 Utah, 166, 53 P. 981, 41 L.R.A. 407; Com. v. National F. Ins. Co. 161 Va. 737, 172 S. E. 448, citing R. C. L.; State ex rel. Case v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; Price v. Moundsville, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878; Thoe v. Chicago, M. & St. P. R. Co. 181 Wis. 456, 195 N. W. 407, 29 A.L.R. 1280; State ex rel. Husting v. State Canvassers, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916D, 159; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

[18] State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

[19] Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219.

[20] State v. Miller, 87 Ohio St. 12, 99 N. E. 1078, 44 L.R.A.(N.S.) 712, Ann. Cas. 1913E, 761; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[1] McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3.

[2] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418.

It is the duty of the courts, when called upon, to take cognizance of the facts and arrest an attempted evasion of the Constitution. Williams v. Louisiana, 103 U. S. 637, 26 L. ed. 595.

A statute enacted under the forms of law by a state legislature with no purpose on its part to violate the United States Constitution may nevertheless, by its necessary operation be destructive of rights granted or secured by that instrument, and the courts must sustain the supreme law of the land by declaring such a statute unconstitutional and void. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862.

[3] Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, rehearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511.

[4] Baker v. Grice, 169 U. S. 284, 42 L. ed.

is the duty of the United States Supreme Court, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the Federal Government.[5]

The duty of the courts to give effect to the Federal and state Constitutions by invalidating acts in conflict with the organic law is not affected by the fact that the invalid legislation may seem highly beneficial or by the fact that great harm or unrest may result from declaring it void. Thus, an unconstitutional old-age pension law cannot be upheld because it is a highly beneficial measure.[6] Moreover, the court cannot avoid declaring void an appropriation which is plainly unconstitutional, regardless of the consequences to other appropriations.[7] Similarly, an act of Congress must be declared invalid if there is a clear incompatibility between it and the Constitution, even though very serious consequences are involved in such a declaration.[8]

The duty of the court to prevent violations of the Constitution does not depend upon the degree to which the principles of the organic law are violated. It is not the province of the court to measure the extent to which the Constitution has been contravened and ignore any violation merely because in the opinion of the court it is not relatively as bad as it might have been.[9]

§ 89. Power Essential to Protection of Liberty.—The principle in the government of England that the Parliament is omnipotent does not prevail in the United States, and every law in this country must conform, in the first place, to the Constitution of the United States, then to the Constitution of its particular state, and so far as it is an infraction of either, it is void.[10] The principle which thus permits the courts to pronounce an act of the legislature null and void, because it conflicts with the provisions of the Constitution, seems to be peculiar to American institutions[11] and has been declared to be one of the strongest barriers ever devised against the tyrannies of political assemblies.[12] The Supreme Court has declared that it is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be obsta principiis.[13] The perpetuity of

748, 18 S. Ct. 323; Baily v. Gentry, 1 Mo. 164, 13 Am. Dec. 484.

A judge does not, by taking oath to support the state Constitution, absolve himself from the duty of upholding the Federal Constitution if it conflicts with the Constitution of the state. People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326. Annotation: 15 A.L.R. 333.

[5] Gordon v. United States, 117 U. S. 697, 76 L. ed. 347; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496.

An act of Congress not authorized by the Constitution is not to be regarded as the supreme law of the land, nor are state judges bound to carry it into execution, and it is the duty of the Federal courts to declare it unconstitutional. Ableman v. Booth, 21 How. (U. S.) 506, 16 L. ed. 169.

Congress is supreme within its legitimate sphere, but if it steps outside its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must, annul its encroachment upon the reserved power of the states or the people. United States v. Reese, 92 U. S. 214, 23 L. ed. 563.

[6] Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515.

[7] Ibid.

[8] Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

[9] Patton v. United States, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263.

The fact that a violation of the Constitution is not a great one is no reason for permitting it. A mere opinion as to the degree of wrong which would arise if the Constitution were violated does not afford a measure of the duty of enforcing its provisions. Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 S. Ct. 85.

[10] See supra, §§ 8, 9.

[11] State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

[12] Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 459, 34 L.R.A. 408.

[13] Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 47 S. Ct. 248; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524.

It is the constitutional duty of the courts to be vigilant to detect and turn aside any attempt to substitute the mere will of an official or an official body for an allowable official discretion or a standing law as a rule of human conduct and to resist even petty encroachments upon the fundamental rights, privileges, and immunities of the people. Jones v. Securities & Exch. Commission, 298 U. S. 1, 80 L. ed. 1015, 56 S. Ct. 654.

our institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation clearly repugnant to the supreme law of the land.[14]

It has been said that the judiciary should protect the rights of the people with great care and jealousy, not only because this is its duty, but also because in times of great popular excitement it is usually their last resort.[15]

§ 90. Solemnity of Responsibility.—The exercise of the right and power of judicial tribunals to declare whether enactments of the legislature exceed the constitutional limitations and are invalid has always been considered to be a grave responsibility[16] and a solemn duty,[17] and is, at all times, a matter of much delicacy,[18] for, apart from the necessity of avoiding conflicts between

If "there be one thing more than others to be guarded against encroachment it is the Federal and state Constitutions. . . . To disobey them is to jeopardize fundamental rights and liberties of the people, imperil their welfare and happiness, and to menace the very existence of government." Saville v. Corless, 46 Utah, 495, 51 P. 51, L.R.A. 1916A, 651, Ann. Cas. 1918D, 198.

[14] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418.

[15] Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, 15 L.R.A. 524.

[16] Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522; People v. Wm. Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A. (N.S.) 1206; Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397; State v. Rogers, 95 Me. 94, 49 A. 564, 85 Am. St. Rep. 395; Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A.L.R. 1562, writ of error dismissed in 248 U. S. 592, 63 L. ed. 436, 39 S. Ct. 21; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

"To challenge the constitutionality of a solemn and deliberate act of legislation by the lawmaking power of a sovereign state always presents a serious question, however trifling or insignificant may be the amount involved in the particular case." Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193.

[17] McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Butler v. Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472; United States v. Fisher, 2 Cranch (U. S.) 358, 2 L. ed. 304; Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373; Internal Improv. Fund v. Bailey, 10 Fla. 112, 81 Am. Dec. 194; University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; Davison v. Johonnot, 7 Met. (Mass.) 388, 11 Am. Dec. 448; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 125 S. W. 1105, 32 L.R.A.(N.S.) 965; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

Annotation: 60 L.R.A. 43.

[18] Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L.R.A.(N.S.) 20; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A.L.R. 1562, writ of error dismissed in 248 U. S. 592, 63 L. ed. 436, 39 S. Ct. 21; Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co. 111 Md. 561, 75 A. 105, 134 Am. St. Rep. 636; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; State v. Baltimore & O. R. Co. 12 Gill & J. (Md.) 399, 38 Am. Dec. 317; Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Brimm v. Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Carter v. Com. 96 Va. 791, 32 S. E. 780, 45 L.R.A. 310; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 5 L.R.A. 621, 25 Am. St. Rep. 863.

The authority to declare a statute void is of such a delicate and awful nature that the court will never resort to that authority except in a clear and urgent case. Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to, or possessed by, the legislature.[19] It has also been said that the power of the courts to nullify acts of the legislature as being in violation of the Constitution is one of the highest functions and authorities of the courts.[20]

2. Exercise of Power

§ 91. Caution Observed.—The courts invariably give the most careful consideration to questions involving the interpretation and application of the Constitution[1] and approach constitutional questions with great deliberation,[2] exercising their power in this respect with the greatest possible caution[3] and even reluctance;[4] and they should never declare a statute void, unless its invalidity is, in their judgment, beyond reasonable doubt.[5] For example, courts should be very slow in declaring legislation unconstitutional which has been frequently re-enacted during the course of a century, where conditions may exist which make such a statute reasonably necessary for the public welfare although the reasons originally stated for its passage may have ceased to exist.[6]

The importance of correctly deciding constitutional questions is so great

[19] Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257.

[20] State v. Hogreiver, 152 Ind. 652. 53 N. E. 921, 45 L.R.A. 504; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

[1] Durousseau v. United States, 6 Cranch (U. S.) 307, 3 L. ed. 232; State v. First State Bank, 52 N. D. 231, 202 N. W. 391, citing R. C. L.; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

[2] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Atlantic Coast Line R. Co. v. State, 134 Ga. 545, 69 S. E. 725, 32 L.R.A. (N.S.) 20; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L.R.A. 588, 86 Am. St. Rep. 306, overruled on another point in Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; State v. Fairmont Creamery Co. 153 Iowa. 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902. 33 L.R.A.(N.S.) 706; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; People v. Budd. 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; State v. First State Bank, 52 N. D. 231, 202 N. W. 391, citing R. C. L.; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

[3] State v. Moore, 76 Ark. 197, 88 S. W. 881, 70 L.R.A. 671; Hubbell v. Higgins. 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Rouse, H. & Co. v. Donovan. 104 Mich. 234, 62 N. W. 359, 27 L.R.A. 577, 53 Am. St. Rep. 457; Greene County v. Lydy. 263 Mo. 77. 172 S. W. 376, Ann. Cas. 1917C, 274; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; Jenkins v. State Bd. of Elections. 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; State v. First State Bank, 52 N. D. 231, 202 N. W. 391, citing R. C. L.; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156. Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A. 1918A. 1193; State ex rel. Bolens v. Frear, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L.R.A.1915B. 569, Ann. Cas. 1913A, 1147. Annotation: 60 L.R.A. 43.

[4] United States v. Butler, 297 U. S. 1. 80 L. ed. 477. 56 S. Ct. 312, 102 A.L.R. 914; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; Atchison, T. & S. F. R. Co. v. State. 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; Ellingham v. Dve, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C. 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; State v. Hogreiver. 152 Ind. 652, 53 N. E. 921. 45 L.R.A. 504; Wenham v. State. 65 Neb. 394, 91 N. W. 421. 58 L.R.A. 825; People ex rel. Bryant v. Zimmerman. 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909. affirmed in 278 U. S. 63. 73 L. ed. 184, 49 S. Ct. 61; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687. 262 N. W. 60, citing R. C. L.; State v. First State Bank, 52 N. D. 231, 202 N. W. 391. citing R. C. L.

Annotation: 60 L.R.A. 43.

As reluctant as are the courts to pass upon the constitutionality of legislation of their own state, they should be still more reluctant in pronouncing unconstitutional an act of a sister state where the same has never been passed upon by the highest court of the state of its enactment. Fensterwald v. Burk, 129 Md. 131. 98 A. 358. 3 A.L.R. 1562. writ of error dismissed in 248 U. S. 592, 63 L. ed. 436, 39 S. Ct. 21.

[5] See infra, § 128.

[6] Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766.

that the Supreme Court of the United States has announced that it is not accustomed to hear them in the absence of a full court if this can be avoided.[7]

These mandates as to the careful exercise of the judicial power in interpreting the Constitution have given rise to a variety of opinions as to the proper conduct of nisi prius courts when such questions are presented.[8] A reluctance is expressed by many courts of first instance against exercising the power to declare an act of the legislature unconstitutional.[9] In fact, it has been stated that a court of first instance will assume a statute to be constitutional until otherwise determined by the higher courts. Especially is this true where the statute in question is one under which the court of last resort of the state has acted.[10] Other trial courts have said that the duty to declare invalid legislation which contravenes the Constitution rests upon the court of first instance as well as upon appellate courts.[11]

§ 92. Necessity of Clear Invalidity.—In order to justify a court in pronouncing a legislative act unconstitutional or a provision of a state Constitution to be in contravention of the Constitution of the United States, the case must be so clear as to be free from doubt.[12] In those jurisdictions in which a trial court may consider the constitutionality of a statute,[13] unless a statute is manifestly and plainly unconstitutional, a trial court should sustain it, particularly where the same question might arise in other counties of the state, in order that a final and uniform decision may be had on appeal.[14]

In all instances where the court exercises its power to invalidate, the conflict of the statute with the Constitution must be irreconcilable,[15] because it is only a decent respect to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until the contrary is shown beyond reasonable doubt.[16] Therefore, in no

[7] Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513.

[8] **A county court** can adjudge a state statute to be unconstitutional. Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 S. Ct. 825.

[9] Annotation: 15 A.L.R. 332.

[10] Annotation: 15 A.L.R. 332.

[11] Annotation: 15 A.L.R. 333.

[12] See infra, § 128.

"Courts can interfere only when the legislature acts in plain disregard of constitutional rights." Winston v. Moore, 244 Pa. 447. 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498.

[13] See supra, § 91.

[14] Re Auditor Gen. 275 Mich. 462, 266 N. W. 464, 107 A.L.R. 279.

[15] Nashville v. Cooper, 6 Wall. (U. S.) 247. 18 L. ed. 851; Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Des Moines v. Manhattan Oil Co. 193 Iowa. 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Naudzius v. Lahr, 253 Mich. 216. 234 N. W. 581, 74 A.L.R. 1189; Hopper v. Britt, 203 N. Y. 144, 96 N. E. 371, 37 L.R.A.(N.S.) 825, Ann. Cas. 1913B, 172; Lynn v. Nichols, 122 Misc. 170. 202 N. Y. S. 401 (affirmed in 210 App. Div. 812, 205 N. Y. S. 935), citing R. C. L.; Jones v. Crittenden, 4 N. C. (1 Car. Law Repos. 335), 6 Am. Dec. 531; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E. 1324; State ex rel. Richards v. Moorer. 152 S. C. 455. 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238) citing R. C. L.; Wingfield v. South Carolina Tax Commission, 147 S. C. 116, 144 S. E. 846, citing R. C. L.

Unless a statute is in positive conflict with some designated or identified provision of the Constitution, it should not be held unconstitutional. State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118.

[16] Legal Tender Cases. 12 Wall. (U. S.) 457, 20 L. ed. 287; Washington, J., in Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Laird v. Sims, 16 Ariz. 521, 147 P. 738, L.R.A.1915F. 519; Beach v. Bradstreet. 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Davis v. Florida Power Co. 64 Fla. 246. 60 So. 759, Ann. Cas. 1914B, 965; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312. 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477; State v. Pooler, 105 Me. 224, 74 A. 119, 24 L.R.A.(N.S.) 408, 134 Am. St. Rep. 543; State v. Camp Sing, 18 Mont. 128. 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. Narragansett. 16 R. I. 424, 16 A. 901, 3 L.R.A. 295; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238) citing R. C. L.; Wingfield v. South Carolina Tax Commission, 147 S. C. 116, 144 S. E. 846, citing R. C. L.; Brimm v.

doubtful case will the judiciary pronounce a legislative act to be contrary to the Constitution; to doubt the constitutionality of a law is to resolve the doubt in favor of its validity.[17]

§ 93. Avoidance of Unnecessary Decisions.—While courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved,[18] needless consideration of attacks on their validity and unnecessary decisions striking down statutes will be avoided.[19] Courts will not assume to pass upon constitutional questions unless properly before them.[20]

Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97, case affirmed on another point in 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863.

For a general discussion of the principle that a statute must be shown to be unconstitutional beyond a reasonable doubt, see infra, § 128.

[17] As to presumption in favor of constitutionality generally, see infra, §§ 128 et seq.

[18] Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052; Bedford v. Schilling, 4 Serg. & R. (Pa.) 401, 8 Am. Dec. 718; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834.

[19] Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285; Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11, 79 A.L.R. 333; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Payne v. Graham, 118 Me. 251, 107 A. 709, 7 A.L.R. 516; Smith v. Curran, 267 Mich. 413, 255 N. W. 276, 94 A.L.R. 766; State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; Milton Dairy Co. v. Great Northern R. Co. 124 Minn. 239, 144 N. W. 764, 49 L.R.A.(N.S.) 951; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; State ex rel. Davies v. White, 36 Nev. 334, 136 P. 110, 50 L.R.A.(N.S.) 195; Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194; Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654, L.R.A.1915D, 1149; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; Bedford v. Schilling, 4 Serg. & R. (Pa.) 401, 8 Am. Dec. 718; Narragansett Electric Lighting Co. v. Sabre, 51 R. I. 37, 150 A. 756, 70 A.L.R. 46; Ex parte Sepulveda, 108 Tex. Crim. Rep. 533, 2 S. W. (2d) 445, citing R. C. L.; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842.

The Iowa court has stated that the rule that courts will not pass upon the validity of statutes unless it is necessary to a disposition of the appeal is one of comity and may properly be departed from in an exceptional case. Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

The court will not, of its own motion, pass upon the constitutionality of a statute, unless it is clearly unconstitutional on its face. Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, L.R.A.1918E, 639.

[20] Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415, citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654, L.R.A.1915D, 1149; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

The court will avoid volunteering an opinion on any question involving the construction of the Constitution, where the case itself does not bring the question directly before them and make it their duty to decide upon it. Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773.

It is the rule of the courts, both state and Federal, not to decide constitutional questions until the necessity for such decision arises in the record before the court. Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 S. Ct. 323.

The validity of the penalties prescribed by the Mississippi anti-trust laws cannot be challenged in a suit in which the state contents itself with a bill in equity to dissolve an association which those laws condemn as a combination in restraint of trade. Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535.

The question whether a state statute giving a lien upon a vessel, enforceable in a state court, for materials and supplies furnished on the credit of the vessel is an

One of the most firmly established doctrines in the field of constitutional law is to the effect that a court will pass upon the constitutionality of a law only when necessary to the determination upon the merits of the cause under consideration.[1] The constitutionality of a statute will not be considered and

unconstitutional infringement upon the exclusive admiralty jurisdiction of the Federal courts of liens of a maritime character is not open in a case in which no maritime lien is asserted. The Winnebago (Iroquois Transp. Co. v. DeLaney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 S. Ct. 509.

[1] **United States.**—Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 737, 34 S. Ct. 372; Light v. United States, 220 U. S. 523, 55 L. ed. 570, 31 S. Ct. 485; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 S. Ct. 31; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 S. Ct. 525; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Huston v. Iowa Soap Co. (C. C. A. 8th) 85 F. (2d) 649, 108 A.L.R. 173.

Alabama. — Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052; Foster v. Lee, 172 Ala. 32, 55 So. 125, Ann. Cas. 1913C, 1335.

Arizona. — Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314.

Arkansas. — Woods v. Carl, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas. 423, affirmed in 203 U. S. 358, 51 L. ed. 219, 27 S. Ct. 99.

California. — Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

Delaware. — Pusey & J. Co. v. Love, 6 Penn. 80, 66 A. 1013, 11 L.R.A.(N.S.) 953, 130 Am. St. Rep. 144.

Florida. — State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L.R.A. 819.

Georgia. — Carter v. Dominey, 157 Ga. 167, 121 S. E. 236, citing R. C. L.

Idaho. — Re Brainard, 55 Idaho, 153, 39 P. (2d) 769, citing R. C. L.; Kimbley v. Adair, 32 Idaho, 790, 189 P. 53, citing R. C. L.

Indiana. — Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; State ex rel. Hunter v. Winterrowd, 174 Ind. 592, 91 N. E. 956, 92 N. E. 650, 30 L.R.A.(N.S.) 886; Smith v. Stephens, 173 Ind. 564, 91 N. E. 167, 30 L.R.A.(N.S.) 704; Kinney v. Citizens Water & Light Co. 173 Ind. 252, 90 N. E. 129, 26 L.R.A.(N.S.) 195; Rose v. State, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co. 169 Ind. 339, 82 N. E. 765, 13 L.R.A.(N.S.) 916, 14 Ann. Cas. 214; Hart v. Smith, 159 Ind. 182, 64 N. E. 661, 58 L.R.A. 949, 95 Am. St. Rep. 280; Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Cleveland. C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 37 L.R.A. 175, 62 Am. St. Rep. 418; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567.

Iowa. — Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; Schultz v. Parker, 158 Iowa, 42, 139 N. W. 173, Ann. Cas. 1915D, 553.

Maine. — Payne v. Graham, 118 Me. 251, 107 A. 709, 7 A.L.R. 516.

Maryland. — Tyler v. State, 93 Md. 309, 48 A. 840, 52 L.R.A. 100.

Michigan.—Teagan Transp. Co. v. Board of Assessors, 139 Mich. 1, 102 N. W. 273, 69 L.R.A. 431, 111 Am. St. Rep. 391.

Minnesota. — State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190.

Mississippi. — Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437.

Missouri. — Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 125 S. W. 1105, 32 L.R.A.(N.S.) 965.

Montana. — Hersey v. Neilson, 47 Mont. 132, 131 P. 30, Ann. Cas. 1914C, 963.

New York. — Re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L.R.A. 255, 7 Am. St. Rep. 684.

North Carolina. — Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415, citing R. C. L.

North Dakota. — Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.; Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654, L.R.A.1915D, 1149.

Oklahoma.—Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964.

Oregon. — Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473.

Pennsylvania. — Bedford v. Shilling, 4 Serg. & R. 401, 8 Am. Dec. 718.

South Carolina. — McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410.

Texas. — Cravens v. State, 57 Tex. Crim. Rep. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

Vermont. — Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

West Virginia. — Fruth v. Board of Affairs, 75 W. Va. 456, 84 S. E. 105, L.R.A. 1915C, 981.

Wyoming. — Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534; State ex rel. Lee v. Continental Oil Co. 48 Wyo. 152, 43 P. (2d) 686, citing R. C. L.

The question of the constitutionality of an act of Congress may be considered by the Supreme Court of the United States only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon it. Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597.

There is no opportunity to question the validity, as violating a constitutional requirement of uniformity of taxation, of the provisions of a state statute enacted to take advantage of the opportunity afforded by the Federal statute permitting succession taxes paid to any state to be credited upon the Federal tax imposed, up to 80 per cent of its amount, because in each

determined by the courts as a hypothetical question,[2] because constitutional questions are not to be dealt with abstractly[3] or in the manner of an academic discussion.[4] It is to be drawn into question only in connection with its application to some person, natural or artificial,[5] and not then at the instance of a stranger, but only on the complaint of those with the requisite interest.[6] Moreover, where a litigant has abandoned a question involving the constitutionality of a statute, the question will not be decided by the court.[7]

These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,[8] and never to consider the constitutionality of state legislation unless it is imperatively required.[9] In a recent case, after stating the principle that it is under no duty to determine the constitutionality of a state statute which is construed not to apply to the case before it, the Supreme Court also declared that where it declines to determine the constitutionality of the statute on that ground, the proper decree to be entered, to protect the parties in the contingency of a contrary decision by the state court, is to strike from the decree of the lower Federal court any adjudication as to the validity of the statute and to add a provision enabling the parties to apply to the court below to determine the constitutional question, in the event the state court construes the statute as applicable to the situation in the case at hand.[10]

Even in jurisdictions where the courts render advisory opinions, the main principle involved in this discussion—namely, the avoidance of unnecessary decisions—has been applied. It has been held that a general inquiry by the legislature of the supreme judicial court as to whether a proposed statute, if enacted into law, would be unconstitutional need not be answered where answers given to specific questions as to its constitutionality are conclusive against it.[11] Furthermore, in disposing of a case submitted to an appellate court upon reserved constitutional questions, the court will limit its answers to those questions which have been specified and fully argued.[12]

§ 94. —Adoption of Alternative Grounds of Decisions.—It is settled as a general principle that courts will not pass on the constitutionality of an act of the legislature if the merits of the case in hand may be fairly determined otherwise without so doing.[13] When the validity of an act of Congress is drawn in question and even if a serious doubt of constitutionality is raised, the Supreme Court of the United States will first ascertain whether a construction of the statute is fairly possible by which the question may be

instance, if the additional tax imposed by the state statute is not paid to the state, the same amount will have to be paid to the National Government, and when paid to the state, the amount in question is allowed by the National Government to the estate making the payment. Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086.

[2] Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935; Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 S. Ct. 525; Georgia v. Stanton, 6 Wall. (U. S.) 50, 18 L. ed. 721; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L.R.A. 819; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 125 S. W. 1105, 32 L.R.A.(N.S.) 965; Re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L.R.A. 255, 7 Am. St. Rep. 684; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951 citing R. C. L.; Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964; Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415, citing R. C. L.

[3] Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Texas v. Interstate Commerce Commission, 258 U. S. 158, 66 L. ed. 531, 42 S. Ct. 261; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; St. Louis S. W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367.

Whether or not provisions of an act of Congress are valid or invalid cannot be made the subject of judicial inquiry until they are given, or are about to be given, some practical application and effect. New Jersey v. Sargent, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122.

The question whether a statute is valid because of uncertainty as to the punishment to be imposed for its violation may not be raised until a punishment is to be applied. United States v. Wurzbach, 280 U. S. 396, 74 L. ed. 508, 50 S. Ct. 167.

[4] Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438.

The validity of a statute regulating transportation by motor vehicles may not be questioned because it authorizes the State Railroad Commission to regulate the rates of private contract carriers, where the Commission has never exercised such power, inasmuch as the court does not deal with academic contentions. Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142.

[5] American Bond & Mortg. Co. v. United States, 282 U. S. 374, 75 L. ed. 395, 51 S. Ct. 118; White v. Johnson, 282 U. S. 367, 75 L. ed. 388, 51 S. Ct. 115.

[6] See generally, infra, §§ 111 et seq.

[7] Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517.

[8] Tennessee Pub. Co. v. American Nat. Bank, 299 U. S. 18, 81 L. ed. 13, 57 S. Ct. 85; Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522; Cincinnati v. Vester, 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360; Liverpool, N. Y. & P. S. S. Co. v. Emigration Comrs. 113 U. S. 33, 28 L. ed. 899, 5 S. Ct. 352; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; State ex rel. Wolyn v. Apalachicola N. R. Co. 81 Fla. 394, 88 So. 310, citing R. C. L.; Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415, citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583.

The United States Supreme Court in dealing with constitutional questions will not go beyond the limits of what is required by the exigencies of the case in hand. Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628.

Courts meet questions as to the validity of legislation as they are raised, but they do not anticipate them. Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302.

In Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016, Justice Sutherland said: "This is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases, as they arise, rather than by out-of-hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned."

A private citizen may not institute a suit to determine whether a statute, if passed, will be valid. Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 S. Ct. 274.

[9] San Bernardino County v. Southern P. R. Co. 118 U. S. 417, 30 L. ed. 125, 6 S. Ct. 1144; Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415 citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.

The Federal Supreme Court will not assume, in the absence of an actual decision of the state court, that the provision of a law of that state will be so broadly construed as to bring it in conflict with the Federal Constitution. Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10.

Until a state law has been given a contrary construction by the state court, it must be construed in the Federal courts in such a way as to leave it valid, and as meeting the requirements of the Constitution. Wadley S. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214.

There is no occasion for the complaint that a state statute permitting the governor to issue a fieri facias against a depository bank for the amount due the state is incompatible with the functions of a national bank acting as depository, where this remedy for enforcing the depository bond has not been used. Lewis v. Fidelity & D. Co. 292 U. S. 559, 78 L. ed. 1425, 54 S. Ct. 848, 92 A.L.R. 794.

[10] Lee v. Bickell, 292 U. S. 415, 78 L. ed. 1337, 53 S. Ct. 727.

[11] Re Opinion of Justices, — Mass. —, 195 N. E. 897, 98 A.L.R. 1364.

[12] Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

[13] Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Canter v. Sachs, 18 Del. Ch. 359, 162 A. 73, citing R. C. L.; Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11, 79 A.L.R. 333; Hart v. Smith, 159 Ind. 182, 64 N. E. 661, 58 L.R.A. 949, 95 Am. St. Rep. 280; Cleveland R. Co. v. Connersville, 147 Ind. 277, 46 N. E. 579, 37 L.R.A. 175, 62 Am. St. Rep. 418; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567; Smith v. Curran, 267 Mich. 413, 255 N. W. 276, 94 A.L.R. 766; McDonnell v. De Soto Sav. & Bldg. Asso. 175 Mo. 250, 75 S. W. 438, 97 Am. St. Rep. 592; Ross v. Lipscomb, 83 S. C. 136, 65 S. E. 451, 137 Am. St. Rep. 794.

avoided.[14] Hence, if the case may be decided on either one of two grounds and one of these does not involve the constitutionality of a statute, the court will decide it on that ground.[15] Nevertheless, in some jurisdictions the courts may determine a question as to the constitutionality of a statute, although it is not absolutely necessary to the disposition of the cause, if it is involved in the suit and the settlement of the question is one of public importance.[16]

§ 95. Prevention of Evasions.—The duty of the courts to declare void any statute which violates the Constitution is not limited to direct violations, but extends to any evasion or indirection which may be practiced by the legislature.[17] What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.[18] Thus, where there is an absence of public liability and public interest and the action of the legislature is clearly evasive of a constitutional limitation of taxing power to public purposes, the mere fiat of the legislature that an act comes within its constitutional power is not binding, and it is the duty of the court to declare the act void.[19]

It has been said that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure and that the courts must be vigilant to prevent such encroachments.[20] They should not permit constitutional provisions to be avoided by a

[14] Wright v. Vinton Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736, 57 S. Ct. 556, — A.L.R. —; Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285.

As to construing a statute to avoid a doubt concerning validity, see infra, § 97.

[15] United States v. L. Cohen Grocery Co. 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 A.L.R. 1045; Light v. United States, 220 U. S. 523, 55 L. ed. 570, 31 S. Ct. 485; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 S. Ct. 451; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 S. Ct. 925; Pensacola Electric Co. v. Soderlind, 60 Fla. 164, 53 So. 722, Ann. Cas. 1912B, 1251; Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11, 79 A.L.R. 333; Hart v. Smith, 159 Ind. 182, 64 N. E. 661, 58 L.R.A. 949, 95 Am. St. Rep. 280; Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S. W. 762, 16 L.R.A.(N.S.) 479; Tate v. School Dist. 324 Mo. 477, 23 S. W. (2d) 1013, 70 A.L.R. 771; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L.R.A. 184; Rhinehart v. State, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254.

[16] People v. Kennedy, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914C, 616; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489.

[17] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56 (same case affirmed in 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168); Atkinson v. Ada County, 18 Idaho, 282, 108 P. 1046, 28 L.R.A.(N.S.) 412; State v. Butterfield Livestock Co. 17 Idaho, 441, 106 P. 455, 26 L.R.A.(N.S.) 1224, 134 Am. St. Rep. 263; People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L.R.A.(N.S.) 1074; Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 1 L.R.A. 437, 8 Am. St. Rep. 386; Voss v. Waterloo Water Co. 163 Ind. 69, 71 N. E. 208, 66 L.R.A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; Kulp v. Fleming, 65 Ohio St. 321, 61 N. E. 334, 87 Am. St. Rep. 611; Lesser v. Warren, 237 Pa. 501, 85 A. 839, 43 L.R.A.(N.S.) 839.

[18] Macallen Co. v. Massachusetts, 279 U. S. 620, 73 L. ed. 874, 49 S. Ct. 432, 65 A.L.R. 866, rehearing denied in 280 U. S. 513, 74 L. ed. 585, 50 S. Ct. 14; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; State ex rel. Childs v. Copeland, 66 Minn. 315, 69 N. W. 27, 34 L.R.A. 777, 61 Am. St. Rep. 410; Doubleday, D. & Co. v. R. H. Macy & Co. 269 N. Y. 272, 199 N. E. 409, 103 A.L.R. 1325; McClintock v. Richlands Brick Corp. 152 Va. 1, 145 S. E. 425, 61 A.L.R. 1033.

A statute which declares that any persons, firms, or corporations refusing to cash any check or scrip presented to them within thirty days of its date of issuance shall be deemed guilty of a misdemeanor has been declared invalid as being an indirect imposition of imprisonment for the nonpayment of a debt. State v. Paint Rock Coal & Coke Co. 92 Tenn. 81, 20 S. W. 499, 36 Am. St. Rep. 68.

[19] Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166.

[20] Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; Yielding v. State, 232 Ala. 292, 167 So. 580, citing R. C. L.; Thomas v. State, 16 Ala. App. 145, 75 So. 821 (writ of certiorari denied in 201 Ala. 697, 77 So. 1001) citing R. C. L.

The ultimate power to preserve the Constitution in its integrity is conferred by it on the courts, whose duty it is to prevent its dismemberment by illegitimate

change in the name of an officer,[1] by organizing a fictitious corporation,[2] or by any other pretext or subterfuge.[3]

B. Construction in Favor of Constitutionality

1. In General

§ 96. Generally.—In construing statutes with relation to constitutional provisions, the courts take into consideration the principle that every statute is to be read in the light of the Constitution[4] and that the Constitution and a statute involving constitutional rights will be construed together as one law.[5] In order to determine the question of the constitutionality of a statute, the function of the court is first to ascertain its meaning by the application of ordinary canons of construction, and then to decide whether, as thus construed, the enactment is within the scope of the legislative power.[6]

In the determination of whether a statute is constitutional, its various applicable provisions must be considered as a whole,[7] including a proviso if it will lend aid in construction.[8] Thus, where a zoning ordinance is attacked upon the broad ground that its mere existence, by materially and adversely affecting values and curtailing opportunities of the market, constitutes a present and irreparable injury, the court will not scrutinize its provisions sentence by sentence to ascertain by process of piecemeal dissection whether there may be here and there provisions of a minor character, those which relate to matters of administration, or those not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.[9]

§ 97. Rules.—It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it.[10] It is the duty

and unconstitutional practices which usually gain a foothold by insidious and apparently harmless approaches to meet imagined emergencies or supposed calamities. Yielding v. State, 232 Ala. 292, 167 So. 580, citing R. C. L.

[1] State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 110, 10 Am. St Rep. 143.

[2] Voss v. Waterloo Water Co. 163 Ind. 69, 81 N. E. 208, 66 L.R.A. 95, 106 Am. St. Rep. 201, 2 Ann. Cas. 978.

[3] Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319.

[4] McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 S. Ct. 134.

[5] Cincinnati, N. O. & T. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57.

[6] Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408.

[7] Wasson v. Planters Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141; Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, 68 A.L.R. 350, affirmed in 281 U. S. 457, 74 L. ed. 962, 50 S. Ct. 382; Ex parte Schatz, 307 Mo. 67, 269 S. W. 383, 38 A.L.R. 1032.

As to the duty of the court to construe a statute as a whole to uphold it where language is doubtful, see infra, § 97.

As to the duty to consider only the portion involved in the instant litigation where that portion is separable from the remainder of the statute, see infra, § 152.

[8] Ex parte Schatz, 307 Mo. 67, 269 S. W. 383, 38 A.L.R. 1032.

[9] Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016.

[10] **United States.** — Chippewa Indians v. United States, 301 U. S. 358, 81 L. ed. 1156, 57 S. Ct. 826; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816; Hopkins Federal Sav. & L. Asso. v. Cleary, 296 U. S. 315, 80 L. ed. 251, 56 S. Ct. 235, 100 A.L.R. 1403; United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42; Porter v. Investors Syndicate, 286 U. S. 461, 76 L. ed. 1226, 52 S. Ct. 617, affirmed on rehearing in 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132; Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285; United States v. La Franca, 282 U. S. 568, 75 L. ed. 551, 51 S. Ct. 278; Russian Volunteer Fleet v. United States, 282 U. S. 481, 75 L. ed. 473, 51 S. Ct. 229; Lucas v. Alexander, 279 U. S. 573, 73 L. ed. 851, 49 S. Ct. 426, 61 A.L.R. 906; Reinecke v. Northern Trust Co. 278 U. S. 339, 73 L. ed. 410, 49 S. Ct. 123, 66 A.L.R. 397; Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 64; Missouri P. R. Co. v. Boone, 270 U. S. 466, 70 L. ed. 688,

46 S. Ct. 341; Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 45 S. Ct. 446, 39 A.L.R. 229; Arkansas Natural Gas Co. v. Arkansas R. Commission, 261 U. S. 379, 67 L. ed. 705, 43 S. Ct. 387; Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157, 43 S. Ct. 43; Texas v. Eastern Texas R. Co. 258 U. S. 204, 66 L. ed. 566, 42 S. Ct. 281; United States v. Standard Brewery, 251 U. S. 210, 64 L. ed. 229, 40 S. Ct. 139; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Union P. R. Co. v. Laramie Stock Yards Co. 231 U. S. 190, 58 L. ed. 179, 34 S. Ct. 101; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 S. Ct. 310; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 S Ct. 115; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Knights Templars' & M. Life Indem. Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 S. Ct. 108; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L ed. 673, 20 S. Ct. 545; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 S. Ct. 966; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 S. Ct. 57; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 261, 28 L. ed. 704, 5 S. Ct. 125; United States v. Howell, 11 Wall. 432, 20 L. ed. 195; Miller v. United States (Page v. United States) 11 Wall. 268, 20 L. ed. 135; United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Link v. Seaboard Airline R. Co. (C. C. A. 4th) 73 F. (2d) 149, citing R. C. L.; Webb v. United States (C. C. A. 8th) 14 F (2d) 574, 49 A.L.R. 612.

Alabama. — State ex rel. Collman v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98; Noble v. Mitchell, 100 Ala. 519, 14 So. 581, 25 L.R.A. 238, affirmed in 164 U. S. 367, 41 L. ed. 472, 17 S. Ct. 110.

Arkansas. — Wasson v. Planters' Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 150 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042.

California. — Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; People v. Globe Grain & Mill. Co. 211 Cal. 121, 294 P. 3, citing R. C. L.; Glassell Development Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Steinhart v. Superior Ct. 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am. St. Rep. 188; Ex parte Cohen, 104 Cal. 524, 38 P. 364, 26 L.R.A. 493, 43 Am. St. Rep. 127; People ex rel. Morgan v. Hayne, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348, 17 Am. St. Rep. 217.

Colorado. — Union P. R. Co. v. De Busk, 12 Colo. 294, 20 P. 752, 3 L.R.A. 350, 13 Am. St. Rep. 221.

Connecticut. — Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 557; Blakeslee v. Water Comrs. 106 Conn. 642, 139 A. 106, 55 A.L.R. 1319.

Delaware. — Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. 389, 44 Am. Dec. 593.

Florida. — Williams v. Jacksonville, 118 Fla. 671, 160 So. 15, 98 A.L.R. 513; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118; State ex rel. Wolyn v. Apalachicola N. R. Co. 81 Fla. 394, 88 So. 310, citing R. C. L.; Re 7 Barrels of Wine, 79 Fla. 1, 83 So. 627, citing R. C. L.; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; State ex rel. Lamar v. Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124.

Georgia. — Newman v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 288 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A. 1915B, 1097, Ann. Cas. 1916C, 280; Strickland v. State, 137 Ga. 1, 72 S. E. 260, 36 L.R.A.(N.S.) 115, Ann. Cas. 1913B, 323.

Idaho. — Wallace v. Pfost, — Idaho, —, 65 P. (2d) 725, 110 A.L.R. 613; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; Smallwood v. Jeter, 42 Idaho, 169, 244 P. 149, citing R. C. L.; State v. Morris, 28 Idaho, 599, 155 P. 296, L.R.A. 1916D, 573.

Illinois. — People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; People ex rel Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090; Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Bjork v. Safford, 333 Ill. 355, 164 N. E. 699, 61 A.L.R. 561; Hanover F. Ins. Co. v. Harding, 327 Ill. 590, 158 N. E. 849, citing R. C. L.; Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; People v. Joyce, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175.

Indiana.—Miles v. Department of Treasury, — Ind. —, 199 N. E. 372, 101 A.L.R. 1359, superseding — Ind. —, 193 N. E. 855, 97 A.L.R. 1474; Brindley v. Meara, — Ind. —, 198 N. E. 301, 101 A.L.R. 682; Klink v. State, 207 Ind. 628, 194 N. E. 352, 99 A.L.R. 317; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Blue v. State, 206 Ind. 98, 188 N. E. 583, 91 A.L.R. 334; Zoercher v. Agler, 202 Ind. 214, 172 N. E. 196, 70 A.L.R. 1232; Thurlton v. Guirl Drainage Co. 184 Ind. 637, 112 N. E. 5, citing R. C. L.; Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N. E. 573, 44 L.R.A.(N.S.) 896, Ann. Cas. 1914A, 1023; Schmidt v. Indianapolis, 168 Ind. 631,

80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385; State v. Lowry, 166 Ind. 342, 77 N. E. 728, 4 L.R.A.(N.S.) 528, 9 Ann. Cas. 350; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729, aff'd in 154 U. S. 439, 38 L. ed. 1041, 14 S. Ct. 1122; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

Iowa.—Seleine v. Wisner, 200 Iowa, 1389, 206 N. W. 130, citing R. C. L.; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803.

Kansas.—Wheeler v. Weightman, 96 Kan. 50, 149 P. 977, L.R.A.1916A, 846; State ex rel. Coleman v. Kelly, 71 Kan. 811, 81 P. 450, 70 L.R.A. 450, 6 Ann. Cas. 298; Re Sanders, 53 Kan. 191, 36 P. 348, 23 L.R.A. 603; Reyburn v. Brackett, 2 Kan. 227, 83 Am. Dec. 457.

Kentucky. — Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 237, 63 A.L.R. 932; Commercial Bkg. & T. Co. v. Citizens Trust & G. Co. 153 Ky. 566, 156 S. W. 160, 45 L.R.A. (N.S.) 950, Ann. Cas. 1915C, 166.

Louisiana.—Berden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Boisdere v. Citizens' Bank, 9 La. 506, 29 Am. Dec. 453.

Maine.—Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194; State ex rel. Young v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

Maryland.—State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742.

Massachusetts. — Hutchins v. Commissioner of Corporations & Taxn. (Hutchins v. Long) 279 Mass. 422, 172 N. E. 605, 71 A.L.R. 677; Thurman v. Chicago, M. & St. P. R. Co. 254 Mass. 569, 151 N. E. 63, 46 A.L.R. 563; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659.

Michigan.—People v. Zerillo, 219 Mich. 635, 189 N. W. 927, 24 A.L.R. 1115.

Minnesota.—State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449.

Mississippi.—Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Louisville & N. R. Co. 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437.

Missouri. — Neil v. Independent Realty Co. 317 Mo. 1235, 298 S. W. 363, 70 A.L.R. 550; Kusnetsky v. Security Ins. Co. 313 Mo. 143, 281 S. W. 47, 45 A.L.R. 189; State ex rel. Barker v. Keeln, 270 Mo. 174, 192 S. W. 748, citing R. C. L.; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601; State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; St. Louis v. Liessing, 199 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112.

Montana. — State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 20 P. 314, 2 L.R.A. 813.

Nebraska.—Burgess-Nash Bldg. Co. v. Omaha, 116 Neb. 862, 219 N. W. 394, citing R. C. L.; Nebraska Dist. v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A.L.R. 1638; State ex rel. Nebraska State R. Commission v. Missouri P. R. Co. 100 Neb. 700, 161 N. W. 270, L.R.A.1918E, 346.

New Hampshire.—Haselton v. Interstate Stage Lines, 82 N. H. 327, 133 A. 451, 47 A.L.R. 218; State v. Lapointe, 81 N. H. 227, 123 A. 692, 31 A.L.R. 1212; Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090; State v. Gerry, 68 N. H. 495, 38 A. 272, 38 L.R.A. 228.

New Jersey.—Ford Motor Co. v. Kearny, 91 N. J. L. 671, 103 A. 254, L.R.A.1918D, 361; State v. Sutton, 87 N. J. L. 192, 94 A. 788, L.R.A.1917E, 1176, Ann. Cas. 1917C, 91, affirmed in 244 U. S. 253, 61 L. ed. 1117, 37 S. Ct. 528; State v. DeLorenzo, 81 N. J. L. 613, 79 A. 839, Ann. Cas. 1912D, 329.

New York.—People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514; Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237, 38 A.L.R. 1079; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773; overruled on another point in Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; People v. Buffalo Fish Co. 164 N. Y. 93, 58 N. E. 36, 52 L.R.A. 803, 79 Am. St. Rep. 622; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L.R.A. 718; McMahon v. Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796.

New Mexico.—State v. Kelly, 27 N. M. 412, 202 P. 524, 21 A.L.R. 156.

North Carolina.—State v. Casey, 201 N. C. 620, 161 S. E. 81, citing R. C. L.; Johnston County v. Lacy, 174 N. C. 141, 93 S. E. 482, 2 A.L.R. 726; McGwigan v. Wilmington & W. R. Co. 95 N. C. 428, 59 Am. Rep. 247.

North Dakota.—Wood v. Byrne, 60 N. D. 1, 232 N. W. 303, citing R. C. L.; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838; Erskine v. Nelson County, 4 N. D. 66, 58 N. W. 348, 27 L.R.A. 696.

Ohio.—State ex rel. Columbus v. Ketterer, 127 Ohio St. 483, 189 N. E. 252, citing R. C. L.; Benjamin Rose Institute v. Myers, 92 Ohio St. 252, 110 N. E. 924, L.R.A. 1916D, 1170; Youngstown v. Fishel, 89 Ohio St. 247, 104 N. E. 141, 50 L.R.A.(N.S.) 921; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305.

Oklahoma. — Ledegar v. Bockoven, 77 Okla. 58, 185 P. 1097, citing R. C. L.; Chicago, R. I. & P. R. Co. v. Beatty, 34 Okla. 321, 118 P. 367, 126 P. 736, 42 L.R.A.(N.S.) 984, reversed on another point in 234 U. S. 753, 58 L. ed. 1577, 34 S. Ct. 777; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008.

Oregon.—Eastern & W. Lumber Co. v. Patterson, 124 Or. 146, 264 P. 441, 60 A.L.R. 528, affirmed in 278 U. S. 581, 73 L. ed. 518, 49 S. Ct. 184; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179.

Pennsylvania.—Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460; Com.

of courts to adopt a construction of a statute that will bring it into harmony with the Constitution, if its language will permit.[11]

v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422.

Rhode Island. — Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756, 70 A.L.R. 46.

South Carolina.—State v. Wilson, 162 S. C. 413, 161 S. E. 104, 81 A.L.R. 580; United States Tire Co. v. Keystone Tire Sales Co. 153 S. C. 56, 150 S. E. 347, 66 A.L.R. 1264; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781.

South Dakota.—Clark Implement Co. v. Wadden, 34 S. D. 550, 149 N. W. 42, L.R.A. 1915C, 414.

Tennessee.—State v. Southern Pub. Asso. 169 Tenn. 257, 84 S. W. (2d) 580, 100 A.L.R. 581; State ex rel. National Conservation Exposition Co. v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C, 465; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015; State ex rel. Aster v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L.R.A. 921; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796.

Texas.—Empire Gas & Fuel Co. v. State, 121 Tex. 138, 47 S. W. (2d) 265, citing R. C. L.; Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Fisher v. L. E. Whitham & Co. 120 Tex. 516, 39 S. W. (2d) 869, 79 A.L.R. 1095; San Saba County Water Control & Improv. Dist. v. Sutton (Tex. Com. App.) 12 S. W. (2d) 134, 70 A.L.R. 1255; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726.

Utah.—Tintic Standard Min. Co. v. Utah County, 80 Utah, 491, 15 P. (2d) 633, citing R. C. L.; State ex rel. Pincock v. Franklin, 63 Utah, 442, 226 P. 674, citing R. C. L.; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Virginia.—Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676; Western U. Teleg. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L.R.A. 429, 19 Am. St. Rep. 908.

Washington. — Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345.

West Virginia.—Ex parte Caldwell, 61 W. Va. 49, 55 S. E. 910, 10 L.R.A.(N.S.) 172; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L.R.A. 600; State v. Richards, 32 W. Va. 348, 9 S. E. 245, 3 L.R.A. 705; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.—Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005; Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 90 N. W. 1067, 58 L.R.A. 739.

Wyoming. — Taxpayers' League v. McPherson, 49 Wyo. 251, 54 P. (2d) 897, 106 A.L.R. 767.

It must be assumed that in passing a law the legislature intended a valid enactment rather than one in conflict with the Constitution. The statutes should, if possible, be so construed as to be constitutional rather than as conflicting with organic law. State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118.

A construction of a statute that makes it unconstitutional should not be adopted if the statute is reasonably susceptible of another which renders it valid, even though on some other point the statute has already been held to be a violation of the Constitution. Sully v. American Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935.

It is settled law that the charter of a municipality of a state statute will not be held to violate the Constitution if any other rational interpretation can be given it, this being particularly true with respect to the states where the legislature has plenary power. Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601.

11 United States.—National Labor Relations Bd. v. Jones & L. S. Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352; Porter v. Investors Syndicate, 286 U. S. 461, 76 L. ed. 1226, 52 S. Ct. 617, affirmed on rehearing in 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132; Russian Volunteer Fleet v. United States, 282 U. S. 481, 75 L. ed. 473, 51 S. Ct. 229; Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 S. Ct. 310; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 S. Ct. 21; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207; Buckland v. Lee (D. C.) 6 F. Supp. 606, citing R. C. L.; Re Van Vliet (C. C.) 43 F. 761, 10 L.R.A. 451; Re Spickler (C. C.) 43 F. 653, 10 L.R.A. 446.

Alabama.—State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; Whaley v. State, 168 Ala. 152, 52 So. 941, 30 L.R.A.(N.S.) 499; State ex rel. Collman v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; Noble v. Mitchell, 100 Ala. 519, 14 So. 581, 25 L.R.A. 238, affirmed in 164 U. S. 367, 41 L. ed. 472, 17 S. Ct. 110.

Arkansas.—St. Louis & S. F. R. Co. v. Heyser, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912A, 610; Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47, affirmed in 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, 18 Ann. Cas. 865; State v. Lancashire F. Ins. Co. 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348; Wells, F. & Co's Exp. v. Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L.R.A. 371.

California.—San Luis Obispo County v. Murphy, 162 Cal. 588, 123 P. 808, Ann. Cas. 1913D, 712; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 P. 633, 38 L.R.A. 460, 62 Am. St. Rep. 261.

Colorado.—Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158.

Florida.—State ex rel. Wolyn v. Apalachicola N. R. Co. 81 Fla. 394, 88 So. 310, citing R. C. L.; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; Escambia County v. Pilot Comrs. 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196.

The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of

Georgia.—Aultman v. Hodge, 150 Ga. 370, 104 S. E. 1, citing R. C. L.; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A. 1915B, 1097, Ann. Cas. 1916C, 280; Strickland v. State, 137 Ga. 1, 72 S. E. 260, 36 L.R.A.(N.S.) 115, Ann. Cas. 1913B, 323; Georgia F. Ins. Co. v. Cedartown, 134 Ga. 87, 67 S. E. 410, 19 Ann. Cas. 954.

Hawaii.—Bannister v. Lucas, 21 Haw. 222, Ann. Cas. 1916A, 1136.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; State v. Morris, 28 Idaho, 599, 155 P. 296, L.R.A.1916D, 573.

Illinois.—Hanover F. Ins. Co. v. Harding, 327 Ill. 590, 158 N. E. 849, citing R. C. L.; Victor Chemical Works v. Industrial Bd. 274 Ill. 1, 113 N. E. 173, Ann. Cas. 1918B, 627; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; People ex rel. Bruce v. Dunne, 258 Ill. 441, 101 N. E. 560, 45 L.R.A.(N.S.) 500; People v. Joyce, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L.R.A. 684.

Indiana.—Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186, 907, 70 A.L.R. 1232; Thorlton v. Guirl Drainage Co. 184 Ind. 637, 112 N. E. 5, citing R. C. L.; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284; Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N. E. 573, 44 L.R.A. (N.S.) 896, Ann. Cas. 1914A, 1023; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A. (N.S.) 1190; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L.R.A.(N.S.) 711; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A. (N.S.) 461; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L.R.A. 729, affirmed in 154 U. S. 439, 38 L. ed. 1041, 14 S. Ct. 1122.

Iowa.—State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A. (N.S.) 821; State ex rel. Witter v. Forkner, 94 Iowa, 1, 62 N. W. 772, 28 L.R.A. 206; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

Kentucky. — Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Newport v. Fitser, 131 Ky. 544, 115 N. W. 742, 21 L.R.A.(N.S.) 279; Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S. W. 762, 16 L.R.A.(N.S.) 479.

Maine.—State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

Massachusetts. — Com. v. People's Exp. Co. 201 Mass. 564, 88 N. E. 420, 131 Am. St. Rep. 416.

Minnesota.—State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

Mississippi.—Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Louisville & N. R. Co. 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150.

Montana.—State ex rel. Malott v. Cascade County, 89 Mont. 37, 296 P. 1, citing R. C. L.

Nebraska. — Burgess-Nash Bldg. Co. v. Omaha, 116 Neb. 862, 219 N. W. 394, citing R. C. L.

New Hampshire.—Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090.

New Jersey.—Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102.

New York.—Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237, 38 A.L.R. 1079; People v. Ringe, 197 N. Y. 143, 90 N. E. 451, 27 L.R.A.(N.S.) 528, 18 Ann. Cas. 474.

North Carolina. — Rosenbaum v. Newbern, 118 N. C. 83, 24 S. E. 1, 32 L.R.A. 123; McGwigan v. Wilmington & W. R. Co. 95 N. C. 428, 59 Am. Rep. 247.

Oklahoma.—Chicago, R. I. & P. R. Co. v. Beatty, 34 Okla. 321, 118 P. 367, 126 P. 736, 42 L.R.A.(N.S.) 984, reversed on other grounds in 234 U. S. 753, 58 L. ed. 1577, 34 S. Ct. 777.

Oregon.—State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179; Portland & W. Valley R. Co. v. Portland, 14 Or. 188, 12 P. 265, 58 Am. Rep. 299.

Pennsylvania.—Com. ex rel. Schnader v. Liveright, 308 Pa. 35, 161 A. 697, citing R. C. L.

South Carolina.—State v. Wilson, 162 S. C. 413, 161 S. E. 104, 81 A.L.R. 580; Ex parte Berry, 85 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.

Tennessee.—Bird v. State, 131 Tenn. 518, 175 S. W. 554, Ann. Cas. 1917A, 634; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126.

Texas.—Rowan Drilling Co. v. Sheppard, 126 Tex. 276, 87 S. W. (2d) 706, 102 A.L.R. 428; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; San Saba County Water Control & Improv. Dist. v. Sutton (Tex. Com. App.) 12 S. W. (2d) 134, 70 A.L.R. 1255.

Utah.—Salter v. Nelson, 85 Utah, 460, 39 P. (2d) 1061, citing R. C. L.

Vermont.—State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22; Re Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A. (N.S.) 232.

Virginia.—Western U. Teleg. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L.R.A. 429, 19 Am. St. Rep. 908.

Washington. — Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; Re Milecke, 52 Wash. 312, 120 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968;

adopting a construction that will not subject it to a succession of doubts as to its constitutionality,[12] for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.[13] Thus, if the proper construction of a statute is doubtful, the doubt must be resolved in favor of the law.[14] For example, the provisions of the Income Tax Law must be construed with an eye to possible constitutional limitations, so as to avoid doubts as to its validity.[15] Moreover, language in a joint resolution of Congress of uncertain meaning will be given a construction which will avoid serious questions as to its constitutional validity.[16] This doctrine may be employed, however, only within reasonable limits. The principle that a statute must be construed, if fairly possible, so as to avoid doubts as to its constitutionality will not be pressed to the point of disingenuous evasion where the legislative intention is distinctly revealed.[17]

State v. Lewis, 45 Wash. 475, 88 P. 940, 122 Am. St. Rep. 934.

West Virginia.—Peel Splint Coal Co. v. State, 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L.R.A. 670; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin. — Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040; Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5, 48 L.R.A.(N.S.) 1004, Ann. Cas. 1914C, 376; State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353.

Annotation: 63 Am. Dec. 519.

The courts are bound to give to the Constitution and laws such a meaning as will make them harmonize unless there is an apparent or fairly to be implied conflict between their respective provisions. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

[12] United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. ed. 253, 29 S. Ct. 115; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[13] National Labor Relations Bd. v. Jones & L. S. Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352; Northwestern Bell Teleph. Co. v. Nebraska State R. Co. 297 U. S. 471, 80 L. ed. 810, 56 S. Ct. 536; George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620; Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co. 288 U. S. 14, 77 L. ed. 588, 53 S. Ct. 266; United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42; United States v. La Franca, 282 U. S. 568, 75 L. ed. 551, 51 S. Ct. 278; Russian Volunteer Fleet v. United States, 282 U. S. 481, 75 L. ed. 473, 51 S. Ct. 229; Lucas v. Alexander, 279 U. S. 573, 73 L. ed. 851, 49 S. Ct. 426, 61 A.L.R. 906; Reinecke v. Northern Trust Co. 278 U. S. 339, 73 L. ed. 410, 49 S. Ct. 123; Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 72 L. ed. 303, 48 S. Ct. 194; Missouri R. Co. v. Boone, 270 U. S. 466, 70 L. ed. 688, 46 S. Ct. 341; Lewellyn v. Frick, 268 U. S. 238, 69 L. ed. 934, 45 S. Ct. 487; Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 45 S. Ct. 446, 39 A.L.R. 229; Michaelson v. United States, 266 U. S. 42, 69 L. ed. 162, 45 S. Ct. 18, 35 A.L.R. 451; Panama R. Co. v. Johnson, 264 U. S. 375, 68 L. ed. 748, 44 S. Ct. 391; Bratton v. Chandler, 260 U. S. 110, 67 L. ed. 157, 43 S. Ct. 43; Texas v. Eastern Texas R. Co. 258 U. S. 204, 66 L. ed. 566, 42 S. Ct. 281; Baender v. Barnett, 255 U. S. 224, 65 L. ed. 597, 41 S. Ct. 271; United States v. Standard Brewery, 251 U. S. 210, 64 L. ed. 229, 40 S. Ct. 139; Carey v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 S. Ct. 403; United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061, 36 S. Ct. 658, Ann. Cas. 1917D, 854; Fox v. Washington, 236 U. S. 273, 59 L. ed. 573, 35 S. Ct. 383; United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 S. Ct. 433; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237, 38 A.L.R. 1079.

Where a statute is susceptible of two constructions, by one of which grave and doubtful questions arise and by the other of which such questions are avoided, it is the duty of the court to adopt the latter construction. Texas v. Eastern Texas R. Co. 258 U. S. 204, 66 L. ed. 566, 42 S. Ct. 281.

[14] Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 991; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; State v. Bartholemew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; State v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; Com. v. Herr, 229 Pa. 132, 78 A. 63, Ann. Cas. 1912A, 422.

As to application of this principle, viz., resolving doubt in favor of the validity of a statute because of the presumption of constitutionality, see infra, § 128.

[15] Lucas v. Alexander, 279 U. S. 573, 73 L. ed. 851, 49 S. Ct. 426, 61 A.L.R. 906.

[16] Ann Arbor R. Co. v. United States, 281 U. S. 658, 74 L. ed. 1098, 50 S. Ct. 444.

[17] Hopkins Federal Sav. & L. Asso. v. Cleary, 296 U. S. 315, 80 L. ed. 251, 56 S. Ct. 235, 100 A.L.R. 1403; George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620.

In accordance with principles of liberal construction, the courts are not justified in declaring an act of the legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect,[18] even though the construction which is adopted does not appear to be as natural as the other.[19] Therefore, the word "shall" in a statute may be held to be not mandatory, if necessary to uphold the constitutionality of the statute.[20]

In construing statutes, the courts favor not only construction as to validity by viewing statutes, in so far as applicable, as a whole,[1] but also construction which, if reasonable, gives effect to statutes as a whole, or to as much of them as possible. The Supreme Court has pointed out that it is only when no other reasonable construction can be supported that an act of Congress, or any part of it, can be declared to be unconstitutional and void or invalid for any cause.[2] This rule is prevalent in the state courts as well, for the courts will, in order to avoid declaring any part of an act unconstitutional, give it such a construction as will enable it to take effect in all its parts,[3] since it is their duty, if possible, not only to construe as a whole and harmonize all valid legislation on the same subject, but also to adopt a construction making all provisions

[18] Re Spickler (C. C.) 43 F. 653, 10 L.R.A. 446; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124; Clendaniel v. Conrad, 3 Boyce (Del.) 549, 83 A. 1036, Ann. Cas. 1915B, 963, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; People v. Munroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Blue v. State, 206 Ind. 98, 188 N. E. 583, 91 A.L.R. 334; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284; State ex rel. Davening v. Barthelemew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. Rep. 663; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State v. Sutton, 87 N. J. L. 192, 94 A. 788, L.R.A.1917E, 1176, Ann. Cas. 1917C, 91, affirmed in 244 U. S. 258, 61 L. ed. 1117, 37 S. Ct. 508; First Nat. Bank v. Bovey, Shute & Jackson, 49 N. D. 450, 191 N. W. 765; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 60, 146 A. 777, 66 A.L.R. 1553; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22; Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928, 6 L.R.A. (N.S.) 628.

A state law should not be pronounced to be a violation of the Federal Constitution if it can upon any other principle be correctly explained. Butler v. Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472.

A statute must be construed as meant to obey the Constitution, if its words will, at all, allow it. Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928, 6 L.R.A.(N.S.) 628.

[19] State v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; Western U. Teleg. Co. v. State, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82; State v. Moore, 76 Ark. 197, 88 S. W. 881, 70 L.R.A. 671; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State ex rel. Utick v. Polk County, 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161; Stewart v. Great Northern R. Co. 65 Minn. 515, 68 N. W. 208, 33 L.R.A. 427; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L.R.A. 791; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; Ledesar v. Bockoven, 77 Okla. 58, 185 P. 1097 (overruled on other grounds in Fulton v. Teeter, 121 Okla. 154, 248 P. 584), citing R. C. L.; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781; State ex rel. National Conservation Exposition Co. v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C, 465; Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; State ex rel. Astor v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

Annotation: 88 Am. St. Rep. 935.

[20] Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

[1] See supra, § 96.

[2] Pauman v. Ross, 167 U. S. 548, 43 L. ed. 270, 17 S. Ct. 966.

As to separability of statutes generally, see infra, §§ 152 et seq.

[3] State v. Lancashire F. Ins. Co. 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348.

valid.[4] Therefore, where the language is of doubtful import, the entire act should be looked to and upheld if possible.[5]

In their efforts to preserve legislation, some courts stretch these principles of liberal construction very far. Thus, it has been stated that the court will, rather than pronounce imperfectly drawn statutes unconstitutional, draw inferences from the evident intent of the legislature, as gathered from the entire statute, supplying by implication technical inaccuracies of expression and obviously unintentional omissions, from the necessity of making them operative and effectual as to specific things included in the broad and comprehensive terms and purposes thereof; and such inferences and implications are as much a part of the statute as what is distinctly expressed therein.[6]

§ 98. —Application.—The rule of favorable construction finds application in the case of state statutes and their relation to the National Government. Such statutes will be interpreted to cover only the field appropriate to state action.[7]

It is the duty of a court, in order to save a statute from being unconstitutional, to construe it to be a general rather than a local law, when it is so worded and framed as to be interpreted as a general rather than a local law.[8] The courts will so construe a statute as to be valid rather than invalid under a constitutional provision as to the title and subject matter of acts.[9] Thus, if the title of an act shows that it is to limit, restrict, and prohibit horse racing, a section purporting to deal with races and race meetings must be construed as referring to horse racing, when to construe it as referring to races of a different character would require the court to declare it to be unconstitutional for including subjects not embraced within its title.[10] It has been also held that a statute which in terms abolishes the doctrine of assumption of risks as a defense to actions by servants for personal injuries will be construed to abolish the defense where the servant is injured by reason of the master's negligence and not to abolish assumption of risk where the master has not been negligent.[11]

§ 99. Limitations of Doctrines.—The principles favoring liberal construc-

[4] Dinuzzo v. State, 85 Neb. 351, 123 N. W. 309, 29 L.R.A.(N.S.) 417.

For general discussion of construing statutes as a whole and harmonizing their parts, see STATUTES [Also 25 R. C. L. p. 1006, § 247].

[5] Wasson v. Planters' Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141.

[6] State ex rel. Utick v. Polk County, 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161.

[7] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Jack, 69 Kan. 387, 76 P. 911, 1 L.R.A.(N.S.) 167, 2 Ann. Cas. 171, affirmed in 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73; Com. v. Gagne, 153 Mass. 205, 26 N. E. 449, 10 L.R.A. 442; Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090; George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 77 N. J. Eq. 219, 79 A. 262, 41 L.R.A.(N.S.) 445; Old Nat. Bank v. County Ct. 58 W. Va. 559, 52 S. E. 494, 3 L.R.A.(N.S.) 584, 6 Ann. Cas. 115.

No act of the legislature is to be construed as infringing upon the constitutional rights of life, liberty, the acquisition of property, and the pursuit of happiness, unless its language plainly and clearly requires such a construction. George Jonas Glass Co. v. Glass Bottle Blowers' Asso. 77 N. J. Eq. 219, 79 A. 262, 41 L.R.A.(N.S.) 445.

A statute will not be construed to impair existing obligations if any other interpretation is reasonably attainable. Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

A construction which makes a statute an unconditional infringement of a general right of contract will not be given to it if some other meaning which would not violate the Constitution can be found in its terms. Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090.

[8] State v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79.

[9] People v. C. Kern Brewing Co. 166 Mich. 292, 131 N. W. 557, 44 L.R.A.(N.S.) 447, Ann. Cas. 1912D, 981.

[10] State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174.

[11] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

tion in favor of constitutionality[12] are accompanied by limitations as well fixed in the law as the liberal doctrines themselves. The rules are well established, therefore, that it is only where the language of the act will bear two constructions that a court is justified in adopting a construction that will sustain the act, rather than one which will defeat it.[13] The courts are not at liberty, in order to sustain a statute, to give to it a forced construction or to read into it and interpolate words which do not appear in the language enacted by the legislature.[14] Where the language used in a statute is plain, the court cannot read words into it that are not found therein either expressly or by fair implication, even to save its constitutionality, because this would be legislation, and not construction.[15] Hence, if the text of an act is unambiguous, it may not be rewritten to accomplish the purpose of preserving the law.[16] Thus, the court may not read into a statute by implication a provision expressly rejected by the legislature.[17]

§ 100. Restrictive Interpretation.—One important corollary of the general doctrine that it is the duty of the courts, if possible, to construe a statute so as to permit its provisions being upheld as constitutional is recognized in interpreting statutes which in their terms are broad enough to cover matters without as well as within the jurisdiction of the legislative body. This general doctrine is that within certain limits the courts, in order to uphold the statute, may restrict its application to the legitimate field of legislation unless the act clearly indicates a different intention on the part of its framers.[18] A

[12] See supra, § 97.

[13] State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489.

[14] Barnes v. Chicago, 323 Ill. 203, 153 N. E. 821, 52 A.L.R. 560; Bielenberg v. Montana U. R. Co. 8 Mont. 271, 20 P. 314, 2 L.R.A. 813; Vanderbilt v. Brunton Piano Co. 111 N. J. L. 596, 169 A. 177, 89 A.L.R. 1080; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484; Ex parte Massey, 49 Tex. Crim. Rep. 60, 92 S. W. 1083, 122 Am. St. Rep. 784.

A court may not, even for the purpose of sustaining the validity of the statute, as an exercise of the police power, read into a statute, providing that a mortgagee may recover a deficiency judgment only for the amount by which the mortgage debt exceeds the fair market value of the mortgaged property at the time of the foreclosure sale, as assessed by the court in the action at law on the bond, a limitation in duration, neither expressed nor implied therein, to the period of an existing financial emergency. Vanderbilt v. Brunton Piano Co. 111 N. J. L. 596, 169 A. 177, 89 A.L.R. 1080.

[15] Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476; Dysart v. St. Louis, 321 Mo. 514, 11 S. W. (2d) 1045, 62 A.L.R. 762; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; Ex parte Woods, 52 Tex. Crim. Rep. 575, 108 S. W. 1171, 16 L.R.A.(N.S.) 450, 124 Am. St. Rep. 1107; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187, L.R.A.1916A, 374, Ann. Cas. 1915B, 997.

The principle that when two constructions of a statute are permissible, the courts, in favor of upholding legislation, should adopt that which is in accord with the organic law does not justify a departure from the plain and natural significance of the words employed, and which the meaning and purpose of the law clearly tend to confirm and support. Johnston County v. Lacy, 174 N. C. 141, 93 S. E. 482, 2 A.L.R. 726; State v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

A statute, the manifest purpose of which is to tax transfers of property, cannot be construed as imposing a direct tax upon the property to save it from being declared unconstitutional. Re Pell, 171 N. Y. 48, 63 N. E. 789, 57 L.R.A. 540, 89 Am. St. Rep. 791.

[16] Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141.

[17] Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484.

[18] Oglesby v. Pacific Finance Corp. 44 Ariz. 449, 38 P. (2d) 646, citing R. C. L.; Ely v. Bugbee, 90 Conn. 584, 98 A. 121, L.R.A. 1916F, 910; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639; Com. v. People's Exp. Co. 201 Mass. 564, 88 N. E. 420, 131 Am. St. Rep. 416; Sault Ste. Marie Hospital v. Chippewa County Treasurer, 209 Mich. 684, 177 N. W. 297, citing R. C. L. (concurring opinion); Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202, citing R. C. L.; Salter v. Nelson, 85 Utah, 460, 39

statute should not be given a broad construction if its validity can be saved by a narrower one.[19] Hence, constitutional objections to a statute which may exist if it is given a wider application than it is necessary to give in deciding a case are not open to consideration therein.[20] Therefore, if a statute may, by a fair and reasonable interpretation of language which, because of its generality or otherwise, is ambiguous, be so limited as to bring it within the scope of the constitutional power of the legislature, it is the duty of the courts to adopt the construction that will bring it into harmony with the Constitution.[1] Similarly, a retrospective operation need not be given to a statute which by its terms may be made to apply to past as well as to future matters, where such retrospective effect would make the statute unconstitutional.[2]

The rule is also generally accepted that when a statute is broad enough to cover matters without the state as well as within, and as applied to matters without the state it would be unconstitutional, the court may restrict the application to matters within the jurisdiction of the state,[3] unless the statute clearly indicates a different intent.[4] The rule is also applied to construe a statute to operate only within the constitutional limitations of the police power.[5]

Another important corollary of the general principle is the rule that a statute need not be treated as unconstitutional or void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limits without necessitating a decree that the act itself is void.[6]

P. (2d) 1061, citing R. C. L.; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

[19] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; United States v. Walter, 263 U. S. 15, 68 L. ed. 137, 44 S. Ct. 10.

In United States v. Walter, 263 U. S. 15, 68 L. ed. 137, 44 S. Ct. 10, it was held that the provision of the Act of October 23, 1918, Chap. 194, making it a crime to conspire to defraud a corporation in which the United States is a stockholder, would not by reason of its general terms be extended to corporations other than those created for war purposes, if such extension might render it unconstitutional.

[20] Frank L. Young Co. v. McNeal-Edwards Co. 283 U. S. 398, 75 L. ed. 1140, 51 S. Ct. 538.

[1] State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 609; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D. 1284; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; McGwigan v. Wilmington & W. R. Co. 95 N. C. 428, 59 Am. Rep. 247; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

A statute which provided that all persons should be denied the right to form or be in any manner interested in, either directly or indirectly, any trust as defined by the act has been held, against the argument that the law was unconstitutional because it prohibited two or more farmers from agreeing not to sell their wheat to a neighboring mill for less than so much a bushel, to be limited to the persons and subjects to which, it is reasonable to presume, the legislature intended it to apply. State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289.

[2] Sohn v. Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313, 36 L.R.A.(N.S.) 354, Ann. Cas. 1913A, 272; Dickinson v. Dickinson, 7 N. C. (3 Murph.) 327, 9 Am. Dec. 608; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

Annotation: 36 Am. Dec. 704; 41 Am. Dec. 275; 82 Am. Dec. 698; 87 Am. Dec. 243.

[3] Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493; New Orleans, M. & C. R. Co. v. State, 110 Miss. 290, 70 So. 355, citing R. C. L.; Stanley v. Wabash, St. L. & P. R. Co. 100 Mo. 435, 13 S. W. 709, 8 L.R.A. 549; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015 (commerce); State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; State v. Peet, 80 Vt. 449, 68 A. 661, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998.

[4] Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537.

[5] Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558.

[6] Re Van Vliet (C. C.) 43 F. 761, 10 L.R.A. 451; State v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L.R.A.(N.S.) 480.

Annotation: 34 L.R.A.(N.S.) 480.

The entire doctrine of restrictive interpretation to preserve validity is subject to necessary limitations. The courts may not, unless a statute is so ambiguous as to call for construction, so limit an act by judicial construction as to confine its operation within the constitutional limits of the legislative power.[7] A court is not permitted to adopt a restrictive construction which would be the mere arbitrary decision of the court, and in effect would amount to a redrafting of the law, in order to make it conform to that which in the view of the court should have been originally enacted by the legislative body.[8] Thus, the court cannot construe a statute forbidding the keeping of account books in other than specified languages so as to insert in it an affirmative requirement that account books not definitely determined, which are adapted to the needs of taxing officials, shall be kept in the permitted languages.[9] It has also been said that a statute which by general language includes in a single class those within and those without a class as to which legislation is constitutionally permitted may not be limited by judicial construction to the latter class and then sustained; and that where the legislature of a state has made no limitation or exception, the legal presumption is that it is intended to make none, and it would be judicial legislation for a court to do so.[10] The doctrine cannot be applied where, in order to employ a restrictive interpretation, a result will be reached which may not have been contemplated or which may produce an unsolvable difficulty. A statute imposing an income tax which is unconstitutional because the rate exceeds the constitutional limit cannot be given effect even in the amount within such limit if the incomes are not taxed alike by the statute, and certain exemptions are allowed therein, and it is impossible to tell what adjustment the legislature would have made under a limited rate.[11]

2. Bearing and Effect of Statute upon Constitutionality

§ 101. Generally.—In passing on the constitutionality of a statute, it is frequently important to examine into its effect and the results it is intended to accomplish,[12] as, for instance, whether a state statute invades the domain of Federal authority.[13] In ascertaining the intention the courts may also look at the possible consequences of a particular interpretation.[14]

The general rule is that in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect.[15] The constitutionality of an act depends on its real char-

[7] United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; Karem v. United States (C. C. A. 6th) 121 F. 250, 61 L.R.A. 437.

[8] State v. Wittles, 118 Minn. 364, 136 N. W. 883, 41 L.R.A.(N.S.) 456, Ann. Cas. 1913E, 433; Vanderbilt v. Brunton Piano Co. 111 N. J. L. 596, 169 A. 177, 89 A.L.R. 1080.

[9] Yu Cong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059, 46 S. Ct. 619.

[10] Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97.

The operation of U. S. Rev. Stat. § 5507, which was manifestly enacted to punish the bribery at all elections, state and Federal, of persons guaranteed the right to vote by the Fifteenth Amendment to the United States Constitution cannot be limited by judicial construction, for the purpose of sustaining its constitutionality, to the bribery of voters at elections for Federal officers. James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 S. Ct. 678.

[11] Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300.

[12] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Moore v. Sanford, 151 Mass. 285, 24 N. E. 323, 7 L.R.A. 151.

[13] Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543.

[14] Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750.

[15] Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831; Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; American

acter and on the end designed to be accomplished rather than on its title or the professions as to its purpose which may be contained in it, and therefore such declarations do not conclude the court.[16] Thus, the question whether a state law deprives a party of rights secured by the Federal Constitution depends upon its practical operation and effect, not upon how it is characterized.[17] Similarly, a declaration by the legislature that an appropriation is for a public purpose is entitled to the most respectful consideration by the courts, although not binding upon them.[18]

The effect to be judged is reasonable and substantial. The constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies.[19]

Since an act depends primarily on its objective result and effect for its validity, the fact that the legislature has mistaken ideas concerning it or that the makers of the Constitution might not have considered it has little bearing upon its constitutionality. Thus, a mistake of the legislature as to the constitutional basis for an act does not prevent the act from being a valid one if it is

Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529, 3 L.R.A. 649, Ann. Cas. 1918E, 724; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 S. Ct. 86; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 S. Ct. 280; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 S. Ct. 576; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; State ex rel. Smith v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.; State v. Jackman, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; Scroggie v. Scarborough, 162 S. C. 218, 160 S. E. 596, citing R. C. L.; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L.R.A.(N.S.) 1196.

16 Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765; State v. Jackman, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438; Re Jacob, 98 N. Y. 98, 50 Am. Rep. 636; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; State v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

The Constitution was intended to prohibit things, not names, and its provisions cannot be evaded by giving a new name to an old thing. Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903.

Mere declaration cannot give character to a law nor turn illegal into legal operation, and where such attempt is palpable, the Supreme Court necessarily has the power of review. Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043.

17 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Wagner v. Covington, 251 U. S. 95, 64 L. ed. 157, 40 S. Ct. 93 (tax law); Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133.

In passing upon the constitutionality of a state law, its effect must be judged in the light of its practical application in the affairs of men as they are ordinarily conducted. North Laramie Land Co. v. Hoffman, 268 U. S. 276, 69 L. ed. 953, 45 S. Ct. 491.

In determining the constitutionality of a law, the Supreme Court of the United States is not concluded by the name or description of the law but will ascertain for itself the nature and effect of it. Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 79 L. ed. 1054, 55 S. Ct. 525, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652.

18 Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424.

19 Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043.

constitutional for other reasons.[20] Nor is it necessary to impute bad motives to the legislature in order to render a statute unconstitutional, it being its effect, not the motive, causing the enactment which will determine the question of constitutionality.[1] It also has been held that the fact that an absentee voters' law originated in an extraordinary emergency not contemplated by the makers of the Constitution does not render it invalid if it was within the power of the legislature to pass.[2]

§ 102. Determination of Intent and Effect.—It has been said that the eyes of courts are never limited to the mere letter of a law, but that they may look behind the letter to determine its true purpose and effect.[3] Accordingly, the principle has been laid down that the courts are not bound by mere forms, nor are they to be misled by mere pretenses; they may look at the substance of things whenever they enter on the inquiry whether the legislature has transcended the limits of its authority.[4]

The validity of a statute or ordinance is to be determined from its general purpose and its efficiency to accomplish the end desired, not from its effect in a particular case.[5] Hence, the question is to be determined by what may be done under and by virtue of its authority, not by what has been done under an act in any particular instance.[6] In some cases, however, the courts may

20 Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983.

1 Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 S. Ct. 627; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821.

While the judiciary in passing upon the constitutionality of a statute is not concerned with its purpose, its effect determines its validity, which is a judicial question. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

"There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164.

As to lack of effect of good or bad motives of the legislature in determining constitutionality of statutes, see infra, § 141.

2 Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247.

3 Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. 67, 34 L. ed. 864, 11 S. Ct. 215; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. ed. 579; People ex rel. Mathews v. Board of Education, 349 Ill. 390, 182 N. E. 455, citing R. C. L.; Hanover F. Ins. Co. v. Harding, 327 Ill. 590, 158 N. E. 849, citing R. C. L.; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.; Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.; Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202, citing R. C. L.; State v. Bayer, 34 Utah, 257, 97 P. 129, 19 L.R.A. (N.S.) 297.

4 Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831; Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 S. Ct. 85; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673; State v. Conlon, 65 Conn. 478, 33 A. 519, 31 L.R.A. 55, 48 Am. St. Rep. 227; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.; Re Opinion of Justices, 81 N. H. 566, 129 A. 117, 39 A.L.R. 1023; State v. Jackman, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438; Lesser v. Warren, 237 Pa. 501, 85 A. 839, 43 L.R.A.(N.S.) 839; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

5 Rochester v. Gutberlett, 211 N. Y. 309, 105 N. E. 548, L.R.A.1915D, 209, Ann. Cas. 1915C, 483.

The essential basis for the exercise of power, and not a mere incidental result arising from its exertion, is the criterion by which the validity of a statute is to be measured. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645.

6 Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 S. Ct. 506; Renlogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Abbott v. McNutt, 218 Cal. 225, 22 P. (2d) 510, 89 A.L.R. 1109; Re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am. St. Rep. 296; Boise-Payette Lumber Co. v. Challis Independent School Dist. 46 Idaho, 403, 268 P. 26, citing R. C. L.; Burtch v. Zeuch, 200 Iowa, 49, 202 N. W. 542, 39 A.L.R. 1349; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.; Spann v. Gaither, 152 Md. 1, 136 A. 41, 50 A.L.R. 620; Ulman v. Baltimore, 72

properly have recourse to an assumed extreme state of facts in order to test the validity of a statute.[7]

Legislation cannot be judged by theoretical standards, but must be tested by the concrete conditions which induced it.[8] Statutes must be judged by their contents, not by allegations as to their purpose in a complaint challenging their constitutionality.[9] Moreover, the fact that legislation is novel is no evidence of unconstitutionality.[10]

A statute valid as to one set of facts may be invalid as to another.[11] The result may arise from the nature of the subject matter of the statute itself. Thus, a statute may be perfectly valid in its general and proper application and yet be held to be void in particular applications of its provisions.[12] It may also arise from changed conditions invalidating a statute;[13] a statute valid at one time may become void at another because of altered circumstances.[14] Thus, if a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by former adjudication, is open to inquiry and investigation in the light of changed conditions.[15] This principle is applicable to acts of Congress.[16] It has been held, however, that where a statute may be in violation of constitutional rights according to circumstances, the existence of circumstances necessary to support it will be presumed.[17]

Md. 587, 609, 20 A. 141, 21 A. 711, 11 L.R.A. 224; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; McInnis v. New Orleans & N. E. R. Co. 109 Miss. 482, 68 So. 481, L.R.A.1915E, 682; Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L.R.A. 1917A, 1185; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 983; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A. (N.S.) 707; Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L.R.A. 548, 79 Am. St. Rep. 662; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; State ex rel. Herigstad v. McCray, 48 N. D. 625, 186 N. W. 280, 22 A.L.R. 530; Stout v. State, 36 Okla. 744, 130 P. 553, 45 L.R.A. (N.S.) 884, Ann. Cas. 1916E, 858; Beveridge v. Baer, 59 S. D. 563, 241 N. W. 727, 84 A.L.R. 189; Watertown v. Christnacht, 39 S. D. 290, 164 N. W. 62, L.R.A. 1917F, 903; Richmond v. Carneal 129 Va. 388, 106 S. E. 403, 14 A.L.R. 1341; Southern R. Co. v. Com. 107 Va. 771, 60 S. E. 70, 17 L.R.A.(N.S.) 364; Violett v. Alexandria, 92 Va. 561, 23 S. E. 909, 31 L.R.A. 389, 53 Am. St. Rep. 825; State v. Peterson, 27 Wyo. 185, 194 P. 342, 13 A.L.R. 1284; Sterritt v. Young, 14 Wyo. 146, 82 P. 946, 4 L.R.A.(N.S.) 169, 116 Am. St. Rep. 994.

The question of constitutional power depends not upon what was done in a particular case, but upon what was authorized to be done. People v. Marquis, 291 Ill. 121, 125 N. E. 757, 8 A.L.R. 874.

The constitutionality of an act requiring plumbers to secure a license through examination by a board of examiners must be tested, not by what the board has actually done, but by the power it has. Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

[7] Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Stanley v. Townsend, 170 Ky. 833, 186 S. W. 941, citing R. C. L.

[8] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529.

[9] Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44, 65 L. ed. 489, 41 S. Ct. 219.

As to pleading generally, see infra, § 126.

[10] Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537.

[11] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435.

As to restrictive construction of a statute to uphold validity, see supra, § 100.

As to application of separable statutes to those situations which they may validly control, see infra, §§ 163 et seq.

[12] Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962.

[13] Re Opinion of Justices, 278 Mass. 607, 181 N. E. 833, 82 A.L.R. 1021.

[14] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486, Vigeant v. Postal Teleg.-Cable Co. 260 Mass. 335, 157 N. E. 651, 53 A.L.R. 867.

[15] Re Opinion of Justices, 278 Mass. 607, 181 N. E. 833, 82 A.L.R. 1021.

[16] Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106.

[17] Boutwell v. Champlain Realty Co. 89 Vt. 80, 94 A. 108, Ann. Cas. 1918A, 726.

For general principles concerning presumptions as to facts underlying legislation, see infra, § 131.

Another well-established principle is that the effect of the statute may be found in the manner in which it is administered.[18] The Supreme Court has stated that not only the final purpose of a law must be considered in determining its justice, but the means of its administration, and the ways it may be defeated, for legislation to be practical and efficient must regard this special purpose as well as the ultimate one.[19] In testing the effect of a statute by the manner of its administration, the test is exactly opposite to that ordinarily employed. In such cases the court looks to what was actually done in the particular instance, and not what might have been done. Thus, where the validity of a tax assessment by state officers is properly challenged, and the matter comes before the Federal Supreme Court, that court must determine the effect of the thing actually done. What might have been done under the local statute is not controlling.[20] In such situations the possibility of abuse is not an objection to constitutionality,[1] and a law cannot be held unconstitutional merely because it may be unfaithfully administered.[2]

C. Determination of Constitutional Questions by State and Federal Courts

1. In General

§ 103. Jurisdiction of Particular Courts.—Generally, the state courts determine whether state statutes conform to the state Constitution.[3] A decision of the United States Supreme Court alone is conclusive as to the validity of statutes alleged to be in violation of the Federal Constitution.[4] It often happens, however, that in the ordinary course of litigation, state courts are called on to determine the validity of a statute under the Federal Constitution,[5] and likewise the validity of a state statute under the state Constitution is sometimes presented to a Federal court for decision.[6]

The question as to the jurisdiction of courts in cases involving the Fourteenth Amendment at one time presented great difficulties. Prior to the adoption of the Fourteenth Amendment, personal rights and rights of property were, as a rule, exclusively matters of state cognizance, and the state courts were the ultimate tribunals for the determination of questions arising under the constitutional guaranty of life, liberty, and property, which was to be found only in the state Constitutions. Their decisions were not subject to

[18] United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 S. Ct. 86.

Since a law may be unconstitutional because of the manner in which it is being administered, a Federal question may be involved on an appeal based, not on a state law as written, but as administered. Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A.1918E, 190.

[19] St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 S. Ct. 554, 5 Ann. Cas. 909.

[20] First Nat. Bank v. Adams, 258 U. S. 362, 66 L. ed. 661, 42 S. Ct. 323.

[1] Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 153.

[2] Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903.

[3] See infra, § 108.

For general discussion of the matters in which Federal courts follow the state courts, and vice versa, see Courts [Also 7 R. C. L. p. 1012, §§ 38 et seq.]; United States Courts [Also 27 R. C. L. p. 44, §§ 49 et seq.].

[4] See infra, § 104.

[5] Baker v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 S. Ct. 323.

If before the constitutionality of an act of Congress has been decided by the Federal Supreme Court, "the enforcement of a state law depends upon whether Congress had power under the Constitution to pass an act the effect of which is to suspend the state law, then it becomes the duty of the state court to act in accordance with its own decision of that question until such time at least as it may be otherwise finally determined by the supreme tribunal." State v. Sawyer, 113 Me. 458, 94 A. 886, L.R.A. 1915F, 1031, Ann. Cas. 1917D, 650.

[6] Porter v. Investors' Syndicate, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 S. Ct. 459; Pelton v. National Bank, 101 U. S. 143, 25 L. ed. 901.

review in the courts of the United States. Since the Fourteenth Amendment the question whether a state statute infringes the constitutional guaranty protecting life, liberty, and property, where it arises in the state court, involves the consideration of both the Federal and state Constitutions, although the ground of construction and decision would be identical under either instrument. But whether the decision of the state court presented a Federal question, reviewable on appeal to the Supreme Court of the United States formerly depended on the nature of the decision of the state court, that is, whether it affirmed the validity of the statute or held it to be unconstitutional and void. If the state court decided that a statute violated the constitutional guaranty, its decision prior to 1914 was, as before the Fourteenth Amendment, final and conclusive, and no appeal could be taken to the Federal court, since in that case no right, under the Constitution and laws of the United States, had been denied. If, on the other hand, the state court sustained the statute and denied the right asserted, the Federal jurisdiction attached and an appeal might be taken to the United States Supreme Court.[7] Decisions of state courts declaring state statutes to be in violation of the Federal Constitution are now reviewable by the Supreme Court of the United States. This is by virtue of the Act of Congress of Dec. 23, 1914 (38 Stat. at L. 790, chap. 2, 28 U. S. C. A. § 344), which provides that "it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been . . . against the validity of the state statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States." It should be borne in mind, however, that the requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the state Constitution and laws into the Fourteenth Amendment for the purposes of the case solely on the ground that the state court was in error and in that way subject a state decision that they have been complied with to revision by the Federal Supreme Court.[8]

2. Effect of Federal Decisions

§ 104. Conclusiveness as to Federal Questions.—It is a fundamental principle of the constitutional system of government of the United States that the decisions of the Federal Supreme Court are final and authoritative declarations as to the proper and correct construction to be placed on the Constitution and laws of the United States,[9] and as to whether a state law contravenes any

[7] Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 5 L.R.A. 559, 15 Am. St. Rep. 460, affirmed in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468.

[8] Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

[9] United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 S. Ct. 86; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A. (N.S.) 126, 16 Ann. Cas. 1234; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 59 P. 1051, 48 L.R.A. 251, 78 Am. St. Rep. 328; Re Taylor, 48 Md. 28, 30 Am. Rep. 451; Larrabee v. Talbott, 5 Gill & J. (Md.) 426, 46 Am. Dec. 637 (overruled on another point in Pinckney v. Lanahan, 62 Md. 447); Frey v. Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581; Re Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Brigham v. Henderson, 1 Cush. (Mass.) 430, 48 Am. Dec. 610; Benton Harbor v. Michigan Fuel & Light Co. 250 Mich. 614, 231 N. W. 52, 71 A.L.R. 114; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; State v. Warner, 165 Mo. 399, 65 S. W. 584, 88 Am. St. Rep. 422; State v. Hays, 50 Mo. 34, 11 Am. Rep. 402; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; Smith v. Par-

provisions of the Federal Constitution.[10] On this principle, the construction given by that court to the Constitution and laws of the United States is received by all as the true construction.[11] Whenever the Supreme Court of the United States declares that state legislation is in conflict with the Federal Constitution, the judicial tribunals of such state are bound to accept and conform to such decision.[12]

If necessary, state tribunals will overrule or modify their prior decisions in order to conform with the announcements of the Supreme Court of the United States in reference to constitutional questions.[13] Similarly, where a state court has held a state statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the Federal Constitution that the supposed conflict is found not to exist, it is customary and proper for the state court to change its rulings so as to sustain such statutes.[14] Hence, if after a state court of last resort has decided that a statute of the state is invalid because it contravenes the Federal Constitution, the Supreme Court of the United States determines that a statute of another state which is substantially similar in all respects does not violate the Constitution of the United States, the state court will overrule its former holding of invalidity in a subsequent case and follow the decision of the Supreme Court of the United States.[15]

§ 105. Conclusiveness as to Other Questions.—Where the provisions of the national and state Constitutions on any subject are identical, the state courts usually acquiesce in the decisions of the national courts interpreting and applying such provisions,[16] although such decisions are not binding on the state courts, but are merely persuasive authority.[17]

sons, 1 Ohio, 236, 13 Am. Dec. 608; Alderman v. Wells, 85 S. C. 507, 67 S. E. 781, 27 L.R.A.(N.S.) 864, 21 Ann. Cas. 193; McCandless v. Richmond & D. R. Co. 38 S. C. 103, 16 S. E. 429, 18 L.R.A. 440; Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L.R.A.(N.S.) 1106, Ann. Cas. 1912C. 284; Vermont & C. R. Co. v. Vermont C. R. Co. 63 Vt. 1, 21 A. 262, 731, 10 L.R.A. 562, writ of error dismissed in 159 U. S. 630, 40 L. ed. 284, 16 S. Ct. 113; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507.

Annotation: Ann. Cas. 1913E, 281.

In considering the application of the Federal Constitution on the question of due process of law, a state Supreme Court is concluded by the decisions of the Federal Supreme Court. Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663.

The construction of the provisions of the Federal Constitution relating to extradition is for the Federal courts. Re Henke, 172 Wis. 36, 177 N. W. 880, 13 A.L.R. 409.

[10] Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Armington v. Barnet, 15 Vt. 745, 40 Am. Dec. 705; Aberdeen Sav. & L. Asso. v. Chase, 157 Wash. 351, 289 P. 536, 290 P. 697, 71 A.L.R. 232.

[11] Annotation: 40 L.R.A.(N.S.) 394.

[12] Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; McFarland v. State Bank, 4 Ark. 44, 37 Am. Dec. 761; Linn v. State Bank, 2 Ill. 87, 25 Am. Dec. 71; Stier v. Iowa State Traveling Men's Asso. 199 Iowa, 118, 201 N. W. 328, 59 A.L.R. 1384; State v. Sioux City, O. & W. R. Co. 46 Neb. 682, 65 N. W. 766, 31 L.R.A. 47.

[13] Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; State v. Woodward, 89 Ind. 110, 46 Am. Rep. 160; State v. Sears, 29 Or. 580, 43 P. 482, 46 P. 785, 54 Am. St. Rep. 808.

[14] Crigler v. Shepler, 79 Kan. 834, 101 P. 619, 23 L.R.A.(N.S.) 500.

[15] Bourjois Sales Corp. v. Dorfmann, 273 N. Y. 167, 7 N. E. (2d) 30, 110 A.L.R. 1411, overruling Doubleday, Doran & Co. v. R. H. Macy & Co. 269 N. Y. 272, 199 N. E. 409, 103 A.L.R. 1325.

[16] Hammond Packing Co. v. State, 81 Ark. 519, 100 S. W. 407, 1199, 126 Am. St. Rep. 1047 (affirmed in 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645); Sperry & H. Co. v. State, 188 Ind. 173, 122 N. E. 584, citing R. C. L.; State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Bussell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1070.

Annotation: 72 Am. St. Rep. 457.

[17] Rothschild & Co. v. Steger & Sons Piano Mfg. Co. 256 Ill. 196, 99 N. E. 920, 42 L.R.A.(N.S.) 793, Ann. Cas. 1913E, 276; State v. Aime, 62 Utah, 476, 220 P. 704, 32 A.L.R. 375. See State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

Annotation: Ann. Cas. 1913E, 281.

The decisions of the Supreme Court of the United States as to the admissibility of evidence under the Fourth and Fifth Amendments to the Federal Constitution are not binding on state courts in interpreting similar provisions of their own state Constitution. State v. Aime, 62 Utah, 476, 220 P. 704, 32 A.L.R. 375.

It does not necessarily follow that because an act has met the approval of the Supreme Court of the United States, as not infringing any provision of the Federal Constitution, it is for that reason consistent with a similar provision contained in a state Constitution. Accordingly, it cannot be maintained that a decision of the Federal court sustaining a state statute is binding on a state court when the same question subsequently arises there under a similar statute. It would still be the duty of the state court to examine the question and decide according to its own interpretation of the state Constitution.[18] A state court is not bound by the construction placed upon a statute of the state by a Federal court, even though that court is the Supreme Court of the United States.[19] Rules of decision applied in the Federal courts do not empower a state court to hold a statute, which has never been held to be constitutional, but is adjudged to conflict with organic law, to be valid as to past transactions, but invalid as to the future, so as to render valid bonds previously issued under the invalid statute to bona fide holders for value. The state courts have no such power under the Constitution, and it cannot be assumed.[20]

3. Effect of State Court Decisions

§ 106. Conclusiveness as to Questions under State Constitutions.—The construction of the Constitution and the statutes of a state by the highest judicial tribunal of the state which enacted them is as a general rule decisive in the Federal courts, in the absence of any question of general or commercial law or of right under the Constitution of the United States.[21] Even the Supreme Court of the United States will accept the interpretation of a statute of a state affixed to it by its court of last resort.[1] There are, however, several exceptions to the general doctrine which seem well established. Several situations exist where the Federal courts, in passing upon the validity or construction of a state statute or constitutional provision, exercise their own judgment independent of the state court decisions. Thus, where the state decisions are rendered subsequent to the accrual of the right which will be affected by its own construction, the Federal court, passing upon statutes or constitutional provisions which affect such a right, will exercise its independent judgment, particularly where the effect of prior state decisions was to sustain such a right, while that of the decisions subsequent to the accrual of the right is to denounce it. It also seems that independent judgment will be exercised by the Federal court in such questions of construction where the right has accrued prior to any state court decision at all upon the question.[2]

§ 107. Decisions Construing State Constitutions.—The Federal courts will follow the decisions of the state courts as to the construction of state Constitutions.[3] The Supreme Court has even gone to the extent of holding that the legislative construction given to a provision of the state Constitution will be followed by the Federal courts in the absence of an authoritative decision by the state courts construing the provision.[4]

Under this principle, it has been held that it is the duty of the Federal courts to render judgment, depending on the construction of a state Constitution, in accordance with the decisions of the highest state court on the subject although, before such state decisions are rendered, the Federal courts have rendered an opinion to the contrary.[5] Similarly, where a state statute has been held unconstitutional under the state Constitution by an inferior state court, and subsequently has been upheld by the highest court of the state, the Supreme Court of the United States will regard the statute as valid under the state Constitution and consider only the question of its validity under the Federal Constitution, although intermediately this court has followed the decision of the lower state court.[6]

The Supreme Court of the United States will not determine the interpretation of the provisions of a state Constitution unless it is necessary to the decision of the case before the court.[7]

The courts of one state will adopt their own methods of construction of a constitutional provision of another state where the courts of the latter state have not construed it.[8]

§ 108. Determination of Constitutionality of State Statutes.—It is a familiar rule that the state courts are the final arbiters of questions as to the conformity of state statutes to the Constitution of the state.[9] Hence, a decision of a state court of last resort that a state law is not in conflict with the state Constitution is binding on the Federal courts,[10] and the fact that such a deci-

18 Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Watson v. State, 109 Neb. 43, 189 N. W. 620, citing R. C. L.; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460.

19 Parsons v. Federal Realty Corp. 105 Fla. 105, 143 So. 912, 88 A.L.R. 275.

20 State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

21 See infra, §§ 107, 108.

1 Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Fairfield v. Gallatin Co. 100 U. S. 47, 25 L. ed. 544; Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Callahan v. St. Louis Merchants' Bridge Terminal R. Co. 170 Mo. 473, 71 S. W. 208, 60 L.R.A. 249, 94 Am. St. Rep. 746.

The construction by the highest court of a state of the operation and effect of a state statute attempting to secure the continuity of a business of food production is controlling on the Supreme Court of the United States. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

2 Annotation: 97 A.L.R. 515 et seq.

As to acquiescence by Federal courts generally, see infra, § 109.

As to a detailed discussion, see Courts.

3 Glenn v. Field Packing Co. 290 U. S. 177, 78 L. ed. 252, 54 S. Ct. 138; Hawks v. Hamill, 288 U. S. 52, 77 L. ed. 610, 53 S. Ct. 240; Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190; Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866, 52 S. Ct. 435; Thornton v. Duffy, 254 U. S. 361, 65 L. ed. 304, 41 S. Ct. 137; Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16; Ohio v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708; Bi-Metallic Invest. Co. v. State Bd. of Equalization, 239 U. S. 441, 60 L. ed. 372, 36 S. Ct. 141; Arkansas S. R. Co. v. Louisiana & A. R. Co. 218 U. S. 431, 54 L. ed. 1097, 31 S. Ct. 56; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 S. Ct. 464; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 S. Ct. 974; Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 523, 7 S. Ct. 358; Wade v. Walnut, 105 U. S. 1, 26 L. ed. 1027; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102; Harrison v. Myer, 92 U. S. 111, 23 L. ed. 606; Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285; Nesmith v. Sheldon, 7 How. (U. S.) 812, 12 L. ed. 925; Badger v. Hoidale (C. C. A. 8th) 88 F. (2d) 208, 109 A.L.R. 798; Harmon v. Bolley, 187 Ind. 511, 120 N. E. 33, 2 A.L.R. 609.

Annotation: 40 L.R.A.(N.S.) 393, 394.

4 Van Dyke v. Geary, 244 U. S. 39, 61 L. ed. 973, 37 S. Ct. 483.

5 Sandford v. Poe (C. C. A. 6th) 69 F. 546, 60 L.R.A. 641, affirmed in 165 U. S. 194, 41 L. ed. 683, 17 S. Ct. 305, which has rehearing denied in 166 U. S. 185, 41 L. ed. 965, 17 S. Ct. 604; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L.R.A. 337.

6 Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678.

7 Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190.

8 Tuttle v. National Bank, 161 Ill. 497, 44 N. E. 984, 34 L.R.A. 750.

9 Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 24 S. Ct. 53, 63 L.R.A. 571; Merchants' & Mfrs.' Bank v. Com. 167 U. S. 461, 42 L. ed. 236, 17 S. Ct. 829; Rosier v. Hale, 10 Iowa, 470, 77 Am. Dec. 127; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274.

Annotation: 63 L.R.A. 571.

10 Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Memphis & C. R. Co. v. Pace, 282 U. S. 241, 75 L. ed. 315, 51 S. Ct. 108, 72 A.L.R. 1096; Louisville Gas & E. Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, 48 S. Ct. 423; Ashe v. United States, 270 U. S. 424, 70 L. ed. 662, 46 S. Ct. 333; General American Tank Car Corp. v. Day, 270 U. S. 367, 70 L. ed. 635, 46 S. Ct. 234; Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 68 L. ed. 541, 44 S. Ct. 261; Lehmann v. State Bd. of Public Accountancy, 263 U. S. 394, 68 L. ed. 354, 44 S. Ct. 128; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689; Orr v. Allen, 248 U. S. 35, 63 L. ed. 109, 39 S. Ct. 23; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A.1918A, 136, Ann. Cas. 1917C, 594; Moss v. Ramey, 239 U. S. 538, 60 L.

sion has been obtained in a prepared case which did not involve a genuine controversy will not prevent the Federal courts from following it.[11] The Federal courts usually will not consider questions as to whether state laws violate provisions of the state Constitution.[12] Although the Supreme Court of the United States is reluctant to pass upon the question whether a state statute conflicts with the state Constitution, it will do so where necessary to a decision of the question before it.[13]

4. Acquiescence by Federal Courts in Construction of State Enactments

§ 109. Generally.—In addition to the inquiry as to what courts may have jurisdiction in the determination of constitutional questions,[14] it is frequently necessary to determine the conclusiveness of the interpretation of statutes as announced by particular tribunals. This question should not be confused with the inquiry as to the conclusiveness of the judicial interpretation of constitutional provisions in cases involving possible conflict between such constitutional provisions and statutory enactments.[15] The question as to the correctness of the construction of a state statute announced by a state court may be involved when appeals are directly taken from the court of last resort of a state to the Supreme Court of the United States. The general rule is that the construction given by the highest state court to a statute of that state is conclusive on the Supreme Court of the United States where the question involved is whether such statute is repugnant to the Federal Constitution.[16] If such

ed. 425, 36 S. Ct. 183; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; Collins v. Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. Ct. 649; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 S. Ct. 511; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 S. Ct. 967; Peters v. Broward, 222 U. S. 483, 56 L. ed. 278, 32 S. Ct. 122; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Montana v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 S. Ct. 281; Flanigan v. Sierra County, 196 U. S. 553, 49 L. ed. 597, 25 S. Ct. 314; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 S. Ct. 318; Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 487, 23 S. Ct. 395, 63 L.R.A. 471; Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 S. Ct. 594; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 S. Ct. 507; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 630, 40 L. ed. 284, 16 S. Ct. 113; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 S. Ct. 294; Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 S. Ct. 675; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766, 10 S. Ct. 363; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Elmwood Twp. v. Marcy, 92 U. S. 289, 23 L. ed. 710; Salomons v. Graham, 15 Wall. (U. S.) 208, 21 L. ed. 37; Gut v. Minnesota, 9 Wall. (U. S.) 35, 19 L. ed. 573; Jackson v. Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679; St. Louis Union Trust Co. v. Franklin-American Trust Co. (C. C. A. 8th) 52 F. (2d) 431, 87 A.L.R. 386, writ of certiorari dismissed in 286 U. S. 533, 76 L. ed. 1274, 52 S. Ct. 642; Harrison v. Remington Paper Co. (C. C. A. 8th) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann. Cas. 314, writ of certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 S. Ct. 747; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L.R.A. 337; Tirrell v. Johnston, 86 N. H. 530, 171 A. 641 (affirmed in 293 U. S. 533, 79 L. ed. 641, 55 S. Ct. 238) citing R. C. L.; State v. Lothrops-Farnham Co. 84 N. H. 322, 150 A. 551, citing R. C. L.

Annotation: 40 L.R.A.(N.S.) 393 et seq.

11 Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 S. Ct. 305.

12 Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 S. Ct. 28; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239.

13 Porter v. Investors Syndicate, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132.

14 See supra, § 103.

15 See supra, §§ 104, 108.

16 Morehead v. New York, 298 U. S. 587, 80 L. ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445; American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522; Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. ed. 863, 39 S. Ct. 428; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 S. Ct. 292, Ann. Cas. 1918C, 617; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 38 S. Ct. 44; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. ed. 1084, 36 S. Ct. 637; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 S. Ct. 892; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, 35 S. Ct. 214; Atlantic Coast Line R. Co. v. Georgia, 234

interpretation renders it constitutional and valid legislation, it will not be disregarded by the United States Supreme Court and a different construction given to the statute which will make it repugnant to the Federal Constitution.[17] The Federal courts, however, are by no means precluded from ascertaining whether a state statute, so construed, violates the United States Constitution. The Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort, is not concluded by its reasoning, but must exercise an independent judgment when called upon to determine the Federal question whether the act, as construed and applied, is repugnant to the restrictions of the Federal Constitution.[18] Consequently, although it is not open to the United States Supreme Court to reverse the construction placed upon a state statute by the state court, the question is open as to whether the application made of the statute is so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve.[19] As a result of these doctrines, the rule is established that in passing on the constitutionality of a state statute, the Supreme Court of the United States and the lower Federal courts will follow the decisions of the state court of last resort as to the purpose and scope of a statute and will only determine whether such statute as so construed is in conflict with the Federal Constitution.[20] While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in the Supreme Court of the United States, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information.[1] In the determination of the constitutionality of state statutes enacted at different dates under which license taxes are assessed, the Federal Supreme Court should follow the decisions of the state court and construe the statutes as being a part of a single scheme.[2]

This same rule of Federal acquiescence in the construction of state enactments is applied to state constitutional provisions where the question is raised as to whether they conflict with the Constitution of the United States. All state enactments, whether in the form of laws or constitutional provisions, may come within the general rule under consideration, and the construction applied to them by state tribunals will normally be accepted by the Federal Courts.[3]

U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; Carlesi v. New York, 233 U. S. 51, 58 L. ed. 843, 34 S. Ct. 576; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 S. Ct. 686; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 S. Ct. 167; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 S. Ct. 435; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 S. Ct. 130; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Kulp v. Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611.

17 Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136.

18 Ward & Gow v. Krinsky, 259 U. S. 503, 66 L. ed. 1033, 42 S. Ct. 529, 28 A.L.R. 1207.

19 Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, 35 S. Ct. 886, L.R.A.1916A, 1208.

20 Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 S. Ct. 126, 7 Ann. Cas. 1104; Mead v. Portland, 200 U. S. 148, 50 L. ed. 413, 26 S. Ct. 171; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 S. Ct. 379; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; St. Louis Union Trust Co. v. Franklin-American Trust Co. (C. C. A. 8th) 52 F. (2d) 431, 87 A.L.R. 386, writ of certiorari dismissed in 286 U. S. 533, 76 L. ed. 1274, 52 S. Ct. 642; Fidelity Life Asso. v. Board of Public Instruction (D. C.) 10 F. Supp. 657 (affirmed in (C. C. A. 5th) 81 F. (2d) 586) citing R. C. L.

1 Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A.1918C, 765, Ann. Cas. 1918E, 660.

2 International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 S. Ct. 292, Ann. Cas. 1918C, 617.

3 Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436, 17 L. ed. 173.

The characterization of an act by a state Supreme Court, as distinguished from its interpretation, is not binding on the Federal Supreme Court.[4]

The Supreme Court of the United States will, in case a state statute is susceptible of a construction which will render it constitutional, resolve all doubt in favor of its constitutionality, in the absence of any construction of the statute by the state courts,[5] for there is a presumption that a state statute will be so construed by the state courts as to uphold it.[6] Furthermore, in the absence of a construction of a statute by a state court, the Supreme Court of the United States, unless obliged to do otherwise, should not adopt a construction which might render the statute of doubtful validity, but should await a determination of the matter by the state court.[7]

An exception exists to the general rule that Federal courts will follow and acquiesce in the interpretation of state statutes placed on them by state courts, as, for example, where a question is raised as to whether a state has impaired the obligation of contracts. Although the contract may be in the form of a statute, in the determination of the question whether a law of the state impairs the obligation of a contract, the Federal courts determine for themselves and by the exercise of their independent judgment the existence and the extent of the contract and the effect of the challenged law. These exceptional cases are considered more at length hereafter.[8]

§ 110. Laws Forming Contracts.—One important exception to the general rule that Federal courts will accept and follow the decisions of a state court as to the interpretation of the laws of such state[9] is that where a question is raised as to whether a state has violated the clause of the Federal Constitution prohibiting the impairment of the obligation of contracts.[10] The Supreme Court of the United States will determine for itself the existence, construction, and validity of the alleged contract, even if this involves the construction of statutes, and will then determine whether the contract as thus construed by it has been impaired by any subsequent state legislation.[11] The Federal Supreme

[4] Federal Land Bank v. Crosland, 261 U. S. 374, 67 L. ed. 703, 43 S. Ct. 385, 29 A.L.R. 1.

[5] Toombs v. Citizens Bank, 281 U. S. 643, 74 L. ed. 1088, 50 S. Ct. 434; South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 67 L. ed. 1004, 43 S. Ct. 577.

As to the general application of this principle, see supra, §§ 97 et seq.

[6] Douglas v. New York, N. H. & H. R. Co. 279 U. S. 377, 73 L. ed. 747, 49 S. Ct. 355; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671.

The Federal Supreme Court will not assume in advance that a state court will so construe a state Employers' Liability Act as to render it obnoxious to the Federal Constitution. Arizona Employers Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537.

[7] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[8] See infra, § 110.

[9] See supra, § 109.

[10] See infra, Vol. 12, Subd. XI.

[11] Coombes v. Getz, 285 U. S. 434, 76 L. ed. 866, 52 S. Ct. 435; Millsaps College v. Jackson, 275 U. S. 129, 72 L. ed. 196, 48 S. Ct. 94; Georgia R. & P. Co. v. Decatur, 262 U. S. 432, 67 L. ed. 1065, 43 S. Ct. 613; Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 64 L. ed. 476, 40 S. Ct. 306, 10 A.L.R. 892; Seton Hall College v. South Orange, 242 U. S. 100, 61 L. ed. 170, 37 S. Ct. 54; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, 35 S. Ct. 72, L.R.A.1918E, 874, Ann. Cas. 1915A, 906; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Sullivan v. Texas, 207 U. S. 416, 53 L. ed. 274, 28 S. Ct. 215; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 S. Ct. 556; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 S. Ct. 427; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257; Waggoner v. Flack, 188 U. S. 595, 47 L. ed. 609, 23 S. Ct. 345; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 S. Ct. 62; Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 S. Ct. 384; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 S. Ct. 240; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 S. Ct. 73; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 S. Ct. 545; Walsh v. Columbus, H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 S. Ct. 393; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 S. Ct. 530, 571; Columbia Water-Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 475, 43 L. ed. 521, 19 S. Ct. 247; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Douglas v. Com. 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Bryan v.

Court has always held that the competency of a state, through its legislation, to make a contract and the meaning and validity of such contract are matters which, in discharging its duty under the Federal Constitution, it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve it from the duty of an independent judgment on the question of contract or no contract.[12] The nature of the contract is only of little importance. In all cases, whether the contract arises from state legislation, by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, the Federal courts are obliged, upon their own judgment and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States.[13]

Where the decision of the question as to the existence of the alleged contract requires a construction of the Constitution of a state, the same principle applies, and the Supreme Court of the United States is not necessarily governed by the previous decisions of the courts of such state as to its construction.[14] Thus, the Federal Supreme Court has jurisdiction to determine whether an amendment of the Constitution of a state as construed by the state court impairs the obligation of a contract of the state previously made.[15]

This exception to the general rule is due to the fact that the Supreme Court has an appellate power to revise the judgment of a state court of last resort whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts.[16] If this power of the Federal courts did not exist to ascertain for themselves whether there is a contract to be impaired, it would follow that the constitutional provisions could always be evaded by the state courts by their giving such a construction to the contract or such decisions concerning its validity

Board of Education, 151 U. S. 639, 38 L. ed. 297, 14 S. Ct. 465; McGahey v. Virginia, 135 U. S. 662, 34 L. ed. 304, 10 S. Ct. 972; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 S. Ct. 741; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 S. Ct. 625; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387; Butz v. Muscatine, 8 Wall. (U. S.) 575, 19 L. ed. 490; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436, 17 L. ed. 173; Ohio L. Ins. & T. Co. v. Debolt, 16 How. (U. S.) 416, 14 L. ed. 997; Piqua State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. ed. 977; Omaha Water Co. v. Omaha (C. C. A. 8th) 147 F. 1, 12 L.R.A.(N.S.) 736, 8 Ann. Cas. 614, appeal dismissed in 207 U. S. 584, 52 L. ed. 352, 28 S. Ct. 262; Fidelity Life Asso. v. Board of Public Instruction (D. C.) 10 F. Supp. 657 (affirmed in (C. C. A. 5th) 81 F. (2d) 586), citing R. C. L.

Whether the passage of a state law impairs the obligation of a contract is a Federal question, in the determination of which the rulings of the state court are not binding upon the Federal courts. Haberlach v. Tillamook County Bank, 134 Or. 279, 293 P. 927, 72 A.L.R. 1245.

[12] Vicksburg v. Vicksburg Waterworks Co. 202 U. S. 453, 50 L. ed. 1102, 26 S. Ct. 660, 6 Ann. Cas. 253; Wilson v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 S. Ct. 384; Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 S. Ct. 493; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 S. Ct. 73; Walsh v. Columbus H. Valley & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 S. Ct. 393; McCullough v. Com. 172 U. S. 102, 43 L. ed. 382, 19 S. Ct. 134; Douglas v. Com. 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 S. Ct. 625.

Annotation: 60 L.R.A. 40.

[13] Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265.

Annotation: 60 L.R.A. 42.

[14] Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 S. Ct. 576.

Annotation: 60 L.R.A. 42.

[15] Williams v. Louisiana, 103 U. S. 637, 26 L. ed. 595.

[16] Douglas v. Com. 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436, 17 L. ed. 173

as to render the power of the Supreme Court of the United States of no avail in upholding it against unconstitutional state legislation.[17]

D. Interest Essential in Raising Constitutional Questions

1. In General

§ 111. Generally.—One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights.[18] Assailants must therefore show the applicability of the statute and that they are thereby injuriously affected.[19] The burden of proof is upon those who claim themselves harmed by a statute to show how, as to them, the statute is unconstitutional.[20] Thus, one who invokes the power of the court to declare an act of Congress to be unconstitutional must be able to show not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[1] The rule that interested parties alone can question the constitutionality of statutes applies likewise to ordinances.[2] The general principle applies even in those jurisdictions where an agreed case may be submitted to the court because of a special enactment providing for such procedure. When this is done and a legislative act is therein attacked as being unconstitutional, the court will determine whether or not the legislative act involved is constitutional as to the persons shown by the agreed case to be affected by the legislative act and will refuse to determine whether or not the legislative act is constitutional as to persons who are not shown by the agreed case to be affected.[3]

The principle obviously results that it is always open to interested persons to show that the legislature has transgressed the limits of its power[4] and that persons injuriously affected may question the validity of a law.[5] Thus, the constitutionality of the provisions of the Social Security Act of 1935 laying excises upon employers and providing for the payment of old-age benefits to employees may properly be determined in a suit brought against a corporation

17 Delmas v. Merchants Ins. Co. 14 Wall. (U. S.) 661, 20 L. ed. 757.

18 **United States.** — Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 80 L. ed. 1155, 56 S. Ct. 754; James Stewart & Co. v. Rivara, 274 U. S. 614, 71 L. ed. 1234, 47 S. Ct. 718; Gorieb v. Fox, 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A.L.R. 1210; Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320; Heald v. District of Columbia, 259 U. S. 114, 66 L. ed. 852, 42 S. Ct. 434; Aikins v. Kingsbury, 247 U. S. 484, 62 L. ed. 1226, 38 S. Ct. 558; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 S. Ct. 532; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 S. Ct. 706; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 S. Ct. 703; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 S. Ct. 958; United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370.

California.—People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.

Connecticut.—State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515.

Florida.—McSween v. State Live Stock Sanitary Bd. 97 Fla. 749, 122 So. 239, 65 A.L.R. 508; State ex rel. Buford v. Watkins, 88 Fla. 392, 102 So. 347, citing R. C. L. (rehearing); State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; Franklin County v. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

Georgia.—Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105.

Illinois.—People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

Indiana.—Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Fesler v. Brayton, 145 Ind. 71, 44 N. E. 37, 32 L.R.A. 578.

Iowa.—Boyd v. Johnson, 212 Iowa. 1201, 238 N. W. 61, citing R. C. L.; Scott County v. Johnson, 209 Iowa, 213, 222 N. W. 378, citing R. C. L.; Iowa L. Ins. Co. v. Black Hawk County, 190 Iowa, 777, 190 N. W. 721, citing R. C. L.

Kansas.—Holton v. Kansas State Bank, 144 Kan. 352, 59 P. (2d) 41, citing R. C. L.

Kentucky.—Sullivan v. Berry, 83 Ky. 198, 4 Am. St. Rep. 147.

Louisiana.—State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574.

Massachusetts.—McGlue v. Essex County, 225 Mass. 59, 113 N. E. 742, citing R. C. L.; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L.R.A. 610; Re Wellington, 16 Pick. 87, 26 Am. Dec. 631.

Michigan.—Schneider v. Grand Rapids, 211 Mich. 399, 179 N. W. 285, citing R. C. L.

Minnesota.—State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190.

Missouri.—Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; State v. Blake, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913C, 1283; State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A.(N.S.) 1060.

Nebraska.—Cram v. Chicago, B. & Q. R. Co. 84 Neb. 607, 85 Neb. 586, 122 N. W. 31, 123 N. W. 1045, 21 L.R.A.(N.S.) 1022, 19 Ann. Cas. 170, affirmed in 228 U. S. 70, 57 L. ed. 734, 33 S. Ct. 437.

Nevada.—Re Goddard, 44 Nev. 128, 190 P. 916, citing R. C. L.

New Mexico.—Asplund v. Hannett, 31 N. M. 641, 249 P. 1074, 58 A.L.R. 573.

New York.—People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; Vroman v. Fish, 181 App. Div. 502, 170 N. Y. Supp. 421 (affirmed without opinion in 223 N. Y. 540, 119 N. E. 1084) citing R. C. L.

North Carolina.—Bickett v. State Tax Commission, 177 N. C. 433, 99 S. E. 415, citing R. C. L.

North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

Ohio.—Prentiss v. Dittmer, 93 Ohio St. 314, 112 N. E. 1021, L.R.A.1917B, 191.

Oklahoma.—Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471.

Pennsylvania.—Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086; Com. v. Dollar Sav. Bank, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048.

Rhode Island.—State v. Heffernan, 40 R. I. 121, 100 A. 55, citing R. C. L.

South Dakota.—Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954; State ex rel. Cranmer v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L.R.A. 582.

Utah.—State v. Candland, 36 Utah, 406, 104 P. 285, 140 Am. St. Rep. 834.

Virginia.—Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

West Virginia.—Belhassen v. Iaeger, 112 W. Va. 598, 166 S. E. 10, citing R. C. L.

Wisconsin.—Van Dyke's Appeal, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

Annotation: 15 Am. St. Rep. 507; 19 Ann. Cas. 175.

Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke the jurisdiction of the Federal Supreme Court with respect thereto. Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140.

19 People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.

The validity under the due process of law clause of the Fourteenth Amendment to the United States Constitution of a statute requiring an affidavit from managing officers of corporations that the corporation "has not issued and does not own any trust certificates" cannot be attacked on the ground of the uncertain meaning of the term "trust certificates" by a corporation whose refusal to file the affidavit was based upon the general theory that the corporation was not obliged to make any such disclosure as is required by that section. Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671.

20 People's Bkg. Co. v. Sterling, 300 U. S. 175, 81 L. ed. 586, 57 S. Ct. 386; Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226, 80 L. ed. 1155, 56 S. Ct. 754.

1 Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597.

2 Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912.

3 Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561.

4 Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320; Chicago v. Ames, 365 Ill. 529, 7 N. E. (2d) 294, 109 A.L.R. 1509.

In a claim case in which the claimant tendered the portion of the tax directly applicable to the property in question and sought release of such property, the transferee at whose instance the property was levied on had such interest in the subject matter that he could raise a constitutional question in aid of the levy. Morris v. Interstate Bond Co. 180 Ga. 689, 180 S. E. 819, 100 A.L.R. 415.

5 Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181.

Failure of commission merchants to attempt to procure licenses under a statute which requires, as a condition thereto, that the applicant agree to comply with the terms and conditions of a marketing agreement establishing prices approved or prescribed by Federal or state authorities, or to seek redress before the administrators of the law, as provided therein, does not preclude them from challenging the validity of the law where they are threatened with immediate and daily prosecution for the penalties prescribed for failure to obtain licenses and thereupon to agree to comply with any lawful orders of the state director of agriculture. Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181.

tion by a stockholder to restrain the corporation from making the payments and deductions from wages required by the act.[6]

The corollary to the general rule is that one who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality.[7]

[6] Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319.

[7] **United States.**—Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575; P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 505, 54 S. Ct. 277, 90 A.L.R. 1285; First Nat. Bank v. Louisiana Tax Commission, 289 U. S. 60, 77 L. ed. 1030, 53 S. Ct. 511, 87 A.L.R. 840; Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. ed. 1155, 52 S. Ct. 595, 81 A.L.R. 1402; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Boston & M. R. Co. v. Armburg, 285 U. S. 234, 76 L. ed. 720, 52 S. Ct. 336; United States v. Wurzbach, 280 U. S. 396, 74 L. ed. 508, 50 S. Ct. 167; Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A.1918A, 136, Ann. Cas. 1917C, 594; Rail & R. Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, 35 S. Ct. 146; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 S. Ct. 167; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Straus v. Foxworth, 231 U. S. 162, 58 L. ed. 163, 34 S. Ct. 42; Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 S. Ct. 985; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 S. Ct. 975; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 S. Ct. 263; Pittsburg Steel Co. v. Baltimore Equitable Soc. 226 U. S. 455, 57 L. ed. 297, 33 S. Ct. 167; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 S. Ct. 120; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 S. Ct. 40; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 S. Ct. 784; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286; Keeney v. Comptroller, 222 U. S. 525, 56 L. ed. 299, 32 S. Ct. 105, 38 L.R.A.(N.S.) 1139; Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Provident Inst. v. Malone, 221 U. S. 660, 55 L. ed. 899, 31 S. Ct. 661, 34 L.R.A.(N.S.) 1129; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 S. Ct. 189; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 S. Ct. 532; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 S. Ct. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 S. Ct. 275; Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 S. Ct. 22; The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 S. Ct. 509; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 S. Ct. 261; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 S. Ct. 188, 9 Ann. Cas. 736; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219; Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 S. Ct. 175; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 S. Ct. 368; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. Ct. 17; Vought v. Columbus, H. V. & A. R. Co. 176 U. S. 481, 44 L. ed. 554, 20 S. Ct. 398; Walsh v. Columbus, H. V. & A. R. Co. 176 U. S. 469, 44 L. ed. 548, 20 S. Ct. 393; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Coffey v. Noel (D. C.) 11 F. (2d) 399, citing R. C. L.; Fidelity & C. Co. v. Freeman (C. C. A. 6th) 109 F. 847, 54 L.R.A. 680.

California.—People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331; People v. Globe Grain & Mill. Co. 211 Cal. 121, 294 P. 3, citing R. C. L.; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; Day v. Metropolitan L. Ins. Co. 11 Cal. App. (2d) 681, 54 P. (2d) 502 (writ of certiorari denied in 299 U. S. 560, 81 L. ed. 413, 57 S. Ct. 22), citing R. C. L.; Platt v. Philbrick, 8 Cal. App. (2d) 27, 47 P. (2d) 302, citing R. C. L.

Florida.—State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, L.R.A.1918E, 639; State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Franklin County v. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

Georgia.—Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L.R.A. 181.

Idaho.—Re Allmon, 50 Idaho, 223, 294 P. 528, citing R. C. L.

Illinois.—People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; People v. Hassil, 341 Ill. 286, 173 N. E. 355, 74 A.L.R. 307; State Pub. Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Tarantina v. Louisville & N. R. Co. 254 Ill.

Thus, one against whom no attempt has been made to enforce a statute may

624, 98 N. E. 999, Ann. Cas. 1913B, 1058.

Indiana.—Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L.R.A. (N.S.) 418; Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Fesler v. Brayton, 145 Ind. 71, 44 N. E. 37, 32 L.R.A. 578; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469.

Iowa.—Scott County v. Johnson, 209 Iowa, 213, 222 N. W. 378, citing R. C. L.; Iowa L. Ins. Co. v. Black Hawk County, 190 Iowa, 777, 180 N. W. 721, citing R. C. L.; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803.

Kentucky.—Shadoan v. Barnett, 217 Ky. 205, 289 S. W. 204, 49 A.L.R. 843; Norman v. Kentucky Bd. of Managers, 93 Ky. 537, 20 S. W. 901, 18 L.R.A. 556; Sullivan v. Berry, 83 Ky. 198, 4 Am. St. Rep. 147; Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203.

Louisiana.—State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; State v. Thrift Oil & Gas Co. 162 La. 165, 110 So. 188, 51 A.L.R. 261; State v. McClellan, 155 La. 37, 98 So. 748, 31 A.L.R. 527.

Maine.—Belfast v. Belfast Water Co. 115 Me. 234, 98 A. 738, L.R.A.1917B, 908.

Massachusetts.—New York L. Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478.

Michigan.—People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024.

Minnesota.—State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; Kinghurst v. International Lumber Co. 174 Minn. 305, 219 N. W. 172, citing R. C. L.

Mississippi.—Gully v. Lumbermen's Mut. Casualty Co. 176 Miss. 388, 166 So. 541, 168 So. 609, citing R. C. L.; Dunn v. Love, 172 Miss. 342, 155 So. 331, 92 A.L.R. 1323, affirmed in 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438; Clark v. State, 169 Miss. 369, 152 So. 820, citing R. C. L.; New Orleans, M. & C. R. Co. v. State, 110 Miss. 290, 70 So. 355, citing R. C. L.

Missouri.—State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A. (N.S.) 1060.

Montana.—Barth v. Pock, 51 Mont. 418, 155 P. 282, citing R. C. L.

Nebraska.—Urbach v. Omaha, 101 Neb. 314, 163 N. W. 307, L.R.A.1917E, 763; Cram v. Chicago, B. & Q. R. Co. 84 Neb. 607, 85 Neb. 586, 122 N. W. 31, 123 N. W. 1045, 26 L.R.A.(N.S.) 1022, 19 Ann. Cas. 170, affirmed in 228 U. S. 70, 57 L. ed. 734, 33 S. Ct. 437.

Nevada.—Pershing County v. Sixth Judicial Dist. Ct. 43 Nev. 78, 181 P. 960, 183 P. 314, citing R. C. L.; Gay v. District Ct. 41 Nev. 330, 171 P. 156, 173 P. 885, 3 A.L.R. 224.

New Hampshire.—State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A.(N.S.) 1115.

New Mexico.—State ex rel. Burg v. Albuquerque, 31 N. M. 576, 249 P. 242, citing R. C. L.; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; Colmes v. Fisher, 151 Misc. 222, 271 N. Y. S. 379, citing R. C. L.; People v. Rensselaer & S. R. Co. 15 Wend. 113, 30 Am. Dec. 33.

North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Mohall-Farmers' Elevator Co. v. Hall, 44 N. D. 430, 176 N. W. 131, citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A. 1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Ohio.—Prentiss v. Dittmer, 93 Ohio St. 314, 112 N. E. 1021, L.R.A.1917B, 191.

Oklahoma.—Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471.

Pennsylvania.—Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912; Com. v. Haldeman, 288 Pa. 81, 135 A. 651, citing R. C. L.; Com. v. Dollar Sav. Bank, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048.

Rhode Island.—State v. Church, 48 R. I. 265, 137 A. 222, citing R. C. L.; State v. Heffernan, 40 R. I. 121, 100 A. 55, citing R. C. L.; Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330.

South Dakota.—Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954.

Tennessee.—Caldwell v. Lyon, 168 Tenn. 607, 80 S. W. (2d) 80, 100 A.L.R. 1152.

Texas.—Dallas Taxicab Co. v. Dallas (Tex. Civ. App.) 68 S. W. (2d) 359, citing R. C. L.

Washington.—State v. Bonham, 93 Wash. 489, 161 P. 377, L.R.A.1917D, 996; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

West Virginia.—Belhassen v. Iaeger, 112 W. Va. 598, 166 S. E. 10, citing R. C. L.

Wisconsin.—State ex rel. Froedtert Grain & Malting Co. v. Tax Commission, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478; Van Dyke's Appeal, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

Wyoming.—Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

Annotation: 19 Ann. Cas. 175; Ann. Cas. 1915C, 57.

Persons whose trees are to be destroyed to eradicate fruit pests cannot raise the question of the unconstitutionality of the statute on the ground that the necessary funds are to be raised by taxing orchard owners who will be benefited by the destruction if the funds to satisfy their claims are to come from another source so that resort to taxation will not be necessary to reimburse them. Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

A person who does not own a dog may not question the constitutionality of a statute imposing a tax on dogs. Shadoan v. Barnett, 217 Ky. 205, 289 S. W. 204, 49 A.L.R. 843.

not challenge its constitutionality,[8] nor may one excepted from the operation of a law attack it.[9]

Even though a person may come within the main purpose of a statute, he has no standing to raise constitutional questions which do not directly affect him,[10] for unless a party can show that he himself has been wrongfully included in the terms of a law, he can have no just ground of complaint.[11] Hence, a litigant can be heard to question the validity of a statute only when, and in so far as, it is applied to his disadvantage.[12]

No one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others,[13] for one attacking the constitutionality of a

The question whether a statute subjecting a vehicle used in violation of law to a lien for damage done by it to any public highway is valid in case the owner of the vehicle has no knowledge of its use or its use is without his consent cannot be raised by one whose vehicle, at the time of damage to the highway, was admittedly being operated by his agent. Mammina v. Alexander Auto Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649.

The beneficiaries under a will disposing of an estate located wholly within the state, subject to succession tax under a state statute which provides that whenever, in any estate, the total tax payable to the state and any other state or territory shall be less than the total credit allowed by the Federal law for taxes paid to the states, then the tax imposed by the act shall be an amount equal to the difference between the total credit allowable by the Federal law for taxes payable to the state government and the total taxes actually paid or payable to the state and any other state or territory under the inheritance tax laws, are not in a position to challenge its constitutionality upon the ground that the measure of the tax might in some cases depend upon a gross estate the tax on which, according to the Federal act would be determined upon all the property of a decedent, wherever situate. Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086. Annotation: 63 A.L.R. 1099.

One who is sued as maker of a note which had been transferred by the payee to the plaintiff and who claims that the note was executed only to be held by the payee pending the adjustment of accounts between them is not in a position to complain that the summary judgment law does not require the plaintiff to make his affidavit with the same degree of particularity that is exacted from the defendant in the affidavit of merits and that the defendant should have the right to subpœna the plaintiff and adverse parties in the event that he requires their testimony in order to prove that he has a meritorious defense. People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024.

One against whom judgment was rendered upon a claim which did not arise out of interstate commerce may not urge the invalidity, under the commerce clause of the Federal Constitution and the Interstate Commerce Act and its amendments, of a state statute allowing a reasonable attorney's fee to the successful plaintiff in a suit upon a claim against "any person or corporation doing business in this state, for personal services rendered, or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees," where the claim was not paid within thirty days after demand and the recovery is for the full amount claimed. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678.

One whose rights are not affected by the period of limitation established by a statute cannot be heard to question the constitutionality of such limitation. Pittsburg Steel Co. v. Baltimore Equitable Soc. 226 U. S. 455, 57 L. ed. 297, 33 S. Ct. 167.

[8] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[9] Gorieb v. Fox, 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A.L.R. 1210.

[10] People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

Even though an unconstitutional act is no law, only those persons whose rights are directly affected thereby can be heard to attack it. Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201.

[11] Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 S. Ct. 532; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289.

[12] Utah Power & Light Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Rindge Co. v. Los Angeles County, 262 U. S. 700, 67 L. ed. 1186, 43 S. Ct. 689; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337.

[13] Bourjois v. Chapman, 301 U. S. 183, 81 L. ed. 1027, 57 S. Ct. 691; Atlantic Coast Line R. Co. v. Ford, 287 U. S. 502, 77 L. ed. 457, 53 S. Ct. 249; Williams v. Riley, 280 U. S. 78, 74 L. ed. 175, 50 S. Ct. 63; Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45; Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Land v. State, 77 Fla. 212, 81 So. 159, citing R. C. L.; Mammina v. Alexander Auto. Serv. Co. 333 Ill. 158, 164 N. E. 173, 61 A.L.R. 649; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Scott County v. Johnson, 209 Iowa, 213, 222 N. W. 378, citing R. C. L.; Iowa L. Ins. Co. v. Black Hawk County, 190 Iowa, 777, 180 N. W. 721, citing R. C. L.; Kansas City v. Union P. R. Co. 59 Kan. 427, 53 P. 468, 52 L.R.A. 321; Sullivan v. Berry, 83 Ky. 198, 4 Am. St. Rep. 147; Kerst v. Nelson, 171 Minn. 191, 213 N. W. 904, 54 A.L.R. 495; State v. Hoffman, 159 Minn. 401, 199 N. W. 175, citing R. C. L.; Gully v. Lumbermen's Mut. Casualty Co. 176 Miss. 388, 166 So. 541, 168 So. 609, citing R. C. L.; Clark v. State, 169 Miss. 369, 152 So. 820, citing R. C. L.; New Orleans. M. & C. R. Co. v. State, 110 Miss. 290, 70 So. 355, citing R. C. L.; Urbach v. Omaha, 101 Neb. 314, 163 N. W. 307, L.R.A.1917E, 1163; Pershing County v. Sixth Judicial Dist. Ct. 43 Nev. 78, 181 P. 960, 183 P. 314, citing R. C. L.; Mohall Farmers' Elevator Co. v. Hall, 44 N. D. 430, 176 N. W. 131, citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A. 1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583; State v. Haskell, 84 Vt. 429, 79 A. 852, 34 L.R.A.(N.S.) 286; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534; McKinney v. State, 3 Wyo. 719, 30 P. 293, 16 L.R.A. 710.

statute is not the champion of any rights except his own.[14] Thus, a statute authorizing the seizure of property of an absconding husband or parent and the application of its proceeds to the maintenance of his abandoned wife or children likely to become a public charge, valid as to him, is valid as to another defending in his right.[15] A bank cannot object to transferring an old unclaimed deposit account to the state because the statute makes no provision for notice to the depositor;[16] but so far, at least, as its rights are involved in those of its depositors, a savings bank may raise the question whether property is taken without due process of law by a statute which provides that deposits which have remained inactive and unclaimed for thirty years shall be paid over to the appropriate state official in cases where not claimed or the depositor is not found, to be held by him as trustee for the depositor or his heirs.[17]

It has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the determination of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character.[18] For example, one

A carrier cannot raise the objection that the government cannot take over the excess profit earned by it above a reasonable return on the investment because the amount should be returned to the shippers to whom it belongs. Dayton-Goose Creek R Co. v. United States, 263 U. S. 456, 68 L. ed. 388, 44 S. Ct. 169, 33 A.L.R. 572.

The true test of the right to relief from the provisions of the National Industrial Recovery Act, on the ground that it was invalid, was whether the act was intended, and necessarily operated, to infringe the rights of the complainant; allegations pointing out specifically the injury that would follow the operation of the provisions of the Code to others by the enforcement of the Code were immaterial. The interest of a dyer who had been discharged because his employer had been obliged under the National Industrial Recovery Act to reduce the operation of his machine was too remote and indirect to enable him to assail the validity of the National Industrial Recovery Act Code. Annotation: 92 A.L.R. 1472.

The directors of a corporation do not represent the bondholders so as to urge the invalidity as to them of a statute repealing the corporate charter. Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122.

One operating a bus for hire cannot attack the validity of an ordinance requiring him to furnish liability insurance with insurers authorized to do business in the state so far as it affects the insurers. Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45.

[14] Henneford v. Silas Mason Co. 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524.

[15] Coler v. Corn Exch. Bank, 250 N. Y. 136, 164 N. E. 882, 65 A.L.R. 879, affirmed in 280 U. S. 218, 74 L. ed. 378, 50 S. Ct. 94.

[16] Com. v. Dollar Sav. Bank, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048.

[17] Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 31 S. Ct. 661, 34 L.R.A.(N.S.) 1129.

[18] Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; White v. Johnson, 282 U. S. 367, 75 L. ed. 388, 51 S. Ct. 115; United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Boyd v. Johnson, 212 Iowa, 1201, 238 N. W. 61, citing R. C. L.; Scott County v. Johnson, 209 Iowa, 213, 222 N. W. 378, citing R. C. L.; Iowa L. Ins. Co. v. Black Hawk County, 190 Iowa, 777, 180 N. W. 721, citing R. C. L.; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; McCoy v. Davis, 38 N. D. 328, 164 N. W. 951, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086; State v. Heffernan, 40 R. I. 121, 100 A. 55, citing R. C. L.; St. Louis S. W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Dallas Taxicab Co. v. Dallas (Tex. Civ. App.) 68 S. W. (2d) 359, citing R. C. L. Annotation: 12 Am. St. Rep. 827.

A foreign corporation doing an interstate

who challenges the validity of state taxation on the ground that it violates the equal protection clause of the Federal Constitution cannot rely on theoretical inequalities, but must show that he himself is affected unfavorably by the discrimination of which he complains. Thus, a corporation all the authorized capital stock of which is issued cannot raise the question of the validity of a statute which measures franchise taxes by authorized, instead of issued, capital stock.[19]

One cannot invoke, in order to defeat a law, an apprehension of what might be done under it and which, if done, might not receive judicial approval; to complain of a ruling one must be the victim of it.[20] Thus, one who is required by statute to take out a license will not be heard to complain, in advance of application, that the statute is invalid as not safeguarding his rights in the event of an arbitrary refusal of the license.[1]

business which has not refused to pay a tax levied on it cannot question the validity of a provision of the tax law excluding from the right to do business in the state all foreign corporations neglecting to pay the tax. Pullman Co. v. Richardson, 261 U. S. 330, 67 L. ed. 682, 43 S. Ct. 366.

An interstate carrier an employee of which was injured while engaged in intrastate commerce only cannot attack the state Workmen's Compensation Act on the ground that it includes within its provisions some employees engaged in both intrastate and interstate commerce. Boston & M. R. Co. v. Armburg, 285 U. S. 234, 76 L. ed. 729, 52 S. Ct. 336.

Employers in hazardous industries may not raise the question whether a state Employers' Liability Act, confined on its face to certain industries denominated "hazardous," is unconstitutional if it is extended by construction to nonhazardous occupations. Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537.

The validity of an election law providing for the appointment and commissioning of judges and clerks of election by the court and that they shall become officers of the court and liable in a proceeding for contempt for any misbehavior in office, as affected by a provision that the election commissioners may remove judges and clerks of election for cause, is not properly before the court in a case not involving the removal of judges and clerks. People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006.

The court will not, in a proceeding by the buyer of a vessel to recover purchase money paid after the vessel is retaken by the seller and not sold as required by state statute, determine the validity of a provision requiring the vessel to be held for thirty days before sale as affecting the right of third persons to proceed in rem for maritime claims. James Stewart & Co. v. Rivara, 274 U. S. 614, 71 L. ed. 1234, 47 S. Ct. 718.

A party whose legal or equitable rights are not touched and who is in no way injured cannot be heard to complain of the impairment of the obligation of his contract as a mere abstract proposition. Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046, 24 S. Ct. 706.

The court will not pass on the validity of a state statute fixing units of weight for loaves of bread made for sale in the state as affected by a provision therein that it shall not apply to fancy breads where it does not appear that any requirement involved in the suit applies to fancy breads made by the complainant or other bakeries. P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 505, 54 S. Ct. 277, 90 A.L.R. 1285.

For general discussion of the fact that the rule involves the avoidance of unnecessary decisions, rather than the narrow aspect that the interest involved must be that of a litigant, see supra, § 93.

19 Roberts & S. Co. v. Emmerson, 271 U. S. 50, 70 L. ed. 827, 46 S. Ct. 375, 45 A.L.R. 1495.

The validity of the provisions of a statute allowing an attorney's fee to the successful plaintiff in suits upon certain designated claims not paid within thirty days after demand, where the recovery is for the full amount claimed, may not be assailed by a defendant upon the ground that natural persons only may avail themselves of its benefits. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678.

One against whose property condemnation proceedings have been instituted by the state cannot complain because in suits brought by the state attorneys' fees are not allowed, while they are allowed in condemnation proceedings brought by railroad companies, since, if the classification is valid, he has no cause to complain, while if it is invalid, the fees denied to him could not in any case be recovered. Dohany v. Rogers, 281 U. S. 362, 74 L. ed. 904, 50 S. Ct. 299, 68 A.L.R. 434.

A purchaser of public land who offers no excuse for his confessed default is not in a position to challenge the validity of a forfeiture statute on the ground that the omission to provide for a judicial review of the default renders the statute invalid as taking his property without due process of law, since such omission does not injure him and, if supplied, would not benefit him. Aikins v. Kingsbury, 247 U. S. 484, 62 L. ed. 1226, 38 S. Ct. 558.

20 Lehon v. Atlanta, 242 U. S. 53, 61 L. ed. 145, 37 S. Ct. 70.

1 Bourjois v. Chapman, 301 U. S. 183, 81 L. ed. 1027, 57 S. Ct. 691; Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. ed. 835, 57 S. Ct. 549.

These principles apply fully to criminal proceedings,[2] and it has been stated that no criminal should be allowed to complain or escape punishment because someone else is more of a criminal or more dangerous to society than he is.[3] An accused cannot raise the question of the constitutionality of a statute which is not the basis of the prosecution against him.[4] Thus, a defendant charged with the violation of a statute, but not charged with any act coming under a certain severable section of the statute, is without the interest necessary to question the validity of that section.[5] A defendant who has not been called on to give evidence against himself and whose person or house has not been subjected to any search has not the necessary interest to raise the question of whether a statute under which he is being prosecuted violates the Bill of Rights with respect to self-incrimination and unreasonable searches and seizures.[6]

The general rule that in order to attack the constitutionality of a statute a person must show sufficient interest in himself applies with full force to attempted attacks upon the constitutionality of acts of the departments of government. It is an established principle that for a private individual to be entitled to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action; it is not sufficient that he has merely a general interest common to all members of the public.[7] Hence, one who is both a citizen and a member of the bar of the Supreme Court has not sufficient interest to raise the question of the constitutionality of the appointment by the President and confirmation by the Senate of a Justice of the Supreme Court of the United States.[8]

§ 112. Exceptions to General Principles.

—An exception to the general principle

2 Stubbs v. People, 40 Colo. 414, 90 P. 1114, 11 L.R.A.(N.S.) 1071, 122 Am. St. Rep. 1068, 13 Ann. Cas. 1025; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; New Orleans v. Sanford, 137 La. 628, 69 So. 35, L.R.A.1916A, 1228; State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A.(N.S.) 1115; McKinney v. State, 3 Wyo. 719, 30 P. 293, 16 L.R.A. 710.

One charged with violation of an order of the Interstate Commerce Commission as to the order of purposes for which coal may be shipped in interstate commerce in cases of emergency cannot avoid liability on the ground that the statute discriminates against certain ports of shipment. Avent v. United States, 266 U. S. 127, 69 L. ed. 202, 45 S. Ct. 34.

One engaged in the business of selling kosher meat cannot enjoin the enforcement of a statute making it unlawful to sell, with intent to defraud, a preparation falsely represented to be kosher, because of fear of hazard of prosecution due to the uncertainty of the statute, since liability depends upon specific intent to defraud. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 69 L. ed. 402, 45 S. Ct. 141.

The defendant in a prosecution for pandering in receiving the earnings of a prostitute cannot successfully attack the constitutionality of the statute which defines such act as pandering upon the ground that it deprives the prostitute of the right to use her money as she sees fit. People v. Hassil, 341 Ill. 286, 173 N. E. 355, 74 A.L.R. 367.

Persons sued for double damages imposed by a statute for making a causal and involuntary trespass by cutting or assisting to cut timber upon state lands cannot complain that because of the further penal features of the law applicable to those offending against its provisions they are subject to be put twice in jeopardy for the same offense. Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 S. Ct. 663.

3 State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13.

4 State v. McClellan, 155 La. 37, 98 So. 748, 31 A.L.R. 527.

5 State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574.

6 State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477.

The validity of a statute as violating the provision of the Sixth Amendment that an accused shall have compulsory process for obtaining witnesses in his favor, in that it provides for the subpœnaing of a witness outside the United States only at the instance of the government, is not open to question by one proceeded against for failure to obey a subpœna. Blackmer v. United States, 284 U. S. 421, 76 L. ed. 375, 52 S. Ct. 252.

7 Ex parte Kelley, — U. S. —, 82 L. ed. (Adv. 1), 58 S. Ct. —; Ex parte Levitt, — U. S. —, 82 L. ed. (Adv. 1), 58 S. Ct. —.

8 Ibid.

ciple that an immediate or direct interest in the enforcement of an act is essential to raising questions of constitutionality[9] has been recognized in some jurisdictions in cases where the jurisdiction of the court itself depends on the validity of a statute, and the attention of the court is called to that fact by persons interested in the effect to be given to the statute, although not actually interested in the case before the court.[10] If the question, however, does not relate to the jurisdiction of the court, an amicus curiæ may not raise it.[11] Another exception of more frequent occurrence relates to the indivisibility of statutes. Occasionally a litigant affected only by a portion of an act will attack the act, including the part relating to his own rights, by asserting the invalidity of an altogether different portion of it, not affecting his rights directly, on the theory that the act is an entirety and that if the portion not affecting his rights is invalid, the whole act is invalid, including that portion directly affecting him.[12] This method of attack has proved successful in some instances, for it has been held that if the entire act is necessarily either valid or invalid, one whose rights are affected may attack its constitutionality even if the particular provision which is questioned does not directly affect the plaintiff's rights.[13] Thus, the receiver of an insolvent state bank in the assets of which a preference is claimed under a state "Bank Collection Code" with respect to a clearance draft drawn by such a bank in favor of the claimant has a right to raise the question of constitutionality of the act on the ground of its invalidity as applied to national banks and the inseparability of its provisions rendering it invalid in its entirety.[14] Of course, on the other hand, in accordance with the general rule that if an act is separable the courts will determine the validity of only that particular portion of the act involved in the instant litigation, and not other parts of the law,[15] if the entire act is not invalid, not only is it immaterial that the complainant's rights may be affected by a portion of the statute other than that which is being attacked,[16] but the constitutionality of a section of a statute will not be considered at the instance of one whose interests are not affected by it if the invalidity of such

[9] See supra, § 111.

[10] New York L. Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

Annotation: 19 Ann. Cas. 186.

[11] New York L. Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; State ex rel. Burg v. Albuquerque, 31 N. M. 576, 249 P. 242, citing R. C. L.; Colmes v. Fisher, 151 Misc. 222, 271 N. Y. S. 379, citing R. C. L.

Annotation: 19 Ann. Cas. 181.

As to the powers of an amicus curiæ with reference to litigation generally, see AMICUS CURIÆ, Vol. 2, p. 680, §§ 4 et seq.

[12] As to inseparable statutes generally, see infra, §§ 152 et seq.

[13] Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

One having a claim against a city for personal injuries sustained in consequence of a defect in a street may question the constitutionality of a charter provision making actual knowledge of a city officer for at least twenty-four hours prior to the occurrence of the injury or damage through personal inspection, or service of written notice, a condition of liability for injury to person or damage to property, as violating a constitutional provision against the taking of property for public use without adequate compensation being made, since the invalidity of the charter provision so far as it relates to damage to property will render the entire act void. Hanks v. Port Arthur, 121 Tex. 202, 48 S. W. (2d) 944, 83 A.L.R. 278.

[14] People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090.

[15] See infra, § 152.

[16] Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 S. Ct. 715; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 S. Ct. 253; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 S. Ct. 120; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A.(N.S.) 1115.

Annotation: 19 Ann. Cas. 177; Ann. Cas. 1915C, 58.

a section will not affect other sections which do affect his interest.[17] Even though a statute is separable and not entire, it has been held that a litigant may attack the constitutionality of a portion of a statute not directly affecting his rights, if the invalidation of such portion of the act will render inoperative another portion of the act which does directly and injuriously affect his rights.[18]

§ 113. Interest as to Discriminatory Laws.—Where the class which includes the party complaining is in no manner prejudiced, the general rule is that it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the laws.[19] Constitutional guaranties of equal rights and privileges are for the benefit of only those persons whose rights are affected, and cannot be taken advantage of by any other person.[20] Consequently, an accident insurance company cannot insist on the invalidity of a statute for unconstitutional discrimination against fire insurance companies.[1] One cannot complain of the possible unequal operation of a statute on others less favorably situated than he is.[2] Thus, residents of a state cannot

[17] Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 839, 43 S. Ct. 470; State Pub. Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A. (N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

[18] McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138.

[19] Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577, 85 A.L.R. 1131; Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45; Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362; Crane v. Johnson, 242 U. S. 339, 61 L. ed. 350, 37 S. Ct. 176, Ann. Cas. 1917B, 796; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 34 S. Ct. 678; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A. (N.S.) 153; Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253, 32 S. Ct. 137; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; People v. Globe Grain & Mill. Co. 211 Cal. 121, 294 P. 3, citing R. C. L.; Platt v. Philbrick, 8 Cal. App. (2d) 27, 47 P. (2d) 302, citing R. C. L.; Scott County v. Johnson, 209 Iowa, 213, 222 N. W. 378, citing R. C. L.; Iowa L. Ins. Co. v. Black Hawk County, 190 Iowa, 777, 180 N. W. 721, citing R. C. L.; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903; Kansas City v. Union P. R. Co. (Kansas City v. Clark) 59 Kan. 427, 53 P. 468, 52 L.R.A. 321, affirmed in 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Shadoan v. Barnett, 217 Ky. 205, 289 S. W. 204, 49 A.L.R. 843; Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 17 S. W. 567, 14 L.R.A. 579; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 125 S. W. 1105, 32 L.R.A.(N.S.) 965; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583; State v. Heffernan, 40 R. I. 121, 100 A. 55, citing R. C. L.; State v. Cage (Tex. Civ. App.) 176 S. W. 928, citing R. C. L.; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A. (N.S.) 842.

The Supreme Court will not consider the constitutionality of a state law when raised by one whose rights are not invaded, although, as against a class making no objection, the law might be held void. New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 S. Ct. 188, 9 Ann. Cas. 736.

A junk dealer cannot invoke the equal protection of the laws clause of the Federal Constitution to invalidate the provisions of statutes which, as construed by the highest court of the state, make it a criminal offense for a dealer in, or collector of, junk, metals, or secondhand materials to buy or receive any stolen wire, cable, copper, lead, solder, iron, or brass used by or belonging to a railroad, telephone, telegraph, gas, or electric light company, without making diligent inquiry for the purpose of ascertaining whether the person selling or delivering it has a legal right to do so, because of the failure of the legislature to extend the protection of the act to the like kinds of property when owned by manufacturers of equipment for railroads, telephone, and telegraph lines or to include the owners of blast furnaces and brass foundries or other classes who are liable to losses by theft of articles of like kinds. Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71.

[20] State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583.

[1] Fidelity & C. Co. v. Freeman (C. C. A. 6th) 109 F. 847, 54 L.R.A. 680.

[2] Shearer v. Burnet, 285 U. S. 228, 76 L. ed. 724, 52 S. Ct. 332.

A judgment of a state court which does not so enforce a state statute as to deprive the party complaining of rights which are protected by the Federal Constitution will not be reversed in the Supreme Court

attack the constitutionality of a statute on the ground that it discriminates against nonresidents.[3] This applies to resident corporations[4] and resident shareholders of national bank stock.[5]

These general principles apply to employers seeking to attack laws affecting employees. A railway company cannot complain for its employees of the repugnancy of the provisions of a law to the Federal Constitution.[6] Nor will an employer be heard to raise constitutional objections to a workmen's compensation law that are good only from the standpoint of employees.[7] Similarly, employers required by a state unemployment compensation act to contribute to the state unemployment compensation fund may not question the validity of separable provisions of the statute levying a tax on their employees for the benefit of the fund.[8] To question a statute, they must show that their rights as employers are infringed.[9] It has been held, however, that a contractor, under prosecution for violation of a statute forbidding the employment of alien laborers, may raise the question of the constitutionality of the statute on the ground that it interferes with the rights of such laborers.[10]

There have been frequent applications of these doctrines to cases involving carriers and other utilities. The objection that a statute requiring common carriers by motor vehicle to obtain a certificate of public convenience and necessity discriminates unlawfully between common and contract carriers because inapplicable to the latter is not available to one against whom there has been no discrimination in favor of contract carriers.[11] A gas-distributing company cannot assert that constitutional rights of a gas-producing and transporting company furnishing gas to the former company upon the basis of a percentage of meter readings will be infringed by a municipal ordinance fixing the gas rates which the distributing company may charge.[12] A railroad company cannot be heard to complain of a statute on the ground that it is unconstitutional as to other kinds of corporations.[13]

of the United States because such statute, when enforced against a class to which the party complaining does not belong, may work a deprivation of such constitutional rights. Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 S. Ct. 22.

3 Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105.

4 American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475, 36 A.L.R. 680.

5 Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 S. Ct. 532.

6 Virginian R. Co. v. System Federation, 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097.

7 Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 S. Ct. 167; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 17 S. W. 567, 14 L.R.A. 579; Lawrence v. Rutland R. Co. 80 Vt. 370, 67 A. 1091, 15 L.R.A. (N.S.) 350, 13 Ann. Cas. 475.

8 Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327.

9 Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10.

Where it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, if the act is not valid as against employees, it is not valid as against employers. Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed 685, 37 S. Ct. 260.

10 People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85.

11 Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1043, 53 S. Ct. 577, 85 A.L.R. 1131.

12 Newark Natural Gas & Fuel Co. v. Newark, 242 U. S. 405, 61 L. ed. 393, 37 S. Ct. 156, Ann. Cas. 1917B, 1025.

13 Aluminum Co. of America v. Ramsey, 222 U. S. 251, 56 L. ed. 185, 32 S. Ct. 76; Pittsburgh, C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L.R.A. 875, 71 Am. St. Rep. 300.

A railway company which might constitutionally have been charged under the state laws with the whole expense of abolishing certain highway grade crossings may not complain that not more than 10

An osteopath cannot object to a statute because of its effect on the followers of Christian Science,[14] nor can one charged with violating his license to practice osteopathy question the constitutionality of the statute providing for the licensing of physicians and surgeons.[15]

In the application of the general rule, it is quite sufficient that the particular objectionable feature of the statute does not happen to prejudice the plaintiff. Thus, a person who has received actual notice cannot claim that a statute violates the Constitution in that it fails to provide for due notice to those who may be affected by its provisions,[16] and an adult who is a fit subject for vaccination cannot question a compulsory vaccination law as applied to one who is not a fit subject for vaccination.[17]

Conversely to the propositions already stated, if a statute so operates as to create a discrimination against a person, it may give a basis for complaint on some constitutional ground. The reduction in the interstate sales of a nonresident manufacturer by reason of a state registration and inspection law affecting the right of the importing purchasers to sell in the original packages, which result he can avoid only by compliance with the statute, gives him a standing to challenge the validity of such act as an unconstitutional regulation of interstate commerce.[18]

§ 114. Necessity of Plaintiff Belonging to Class Affected.—A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.[19] Thus, none but householders can attack the

per cent of the cost of abolishing three crossings used by a street railway is thrown upon the latter company. Erie R. Co. v. Public Utility Comrs. 254 U. S. 394, 65 L. ed. 322, 41 S. Ct. 169.

14 Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286.

15 State v. Bonham, 93 Wash. 489, 161 P. 377, L.R.A.1917D, 996.

16 Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540.

17 Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

18 Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715.

19 First Nat. Bank v. Louisiana Tax Commission, 289 U. S. 60, 77 L. ed. 1030, 53 S. Ct. 511, 87 A.L.R. 840; Shearer v. Burnet, 285 U. S. 228, 76 L. ed. 724, 52 S. Ct. 332; Interstate Busses Corp. v. Holyoke Street R. Co. 273 U. S. 45, 71 L. ed. 530, 47 S. Ct. 298; Heald v. District of Columbia, 259 U. S. 114, 66 L. ed. 852, 42 S. Ct. 434; Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Arkadelphia Mill. Co. v. St. Louis S. W. R. Co. 249 U. S. 134, 63 L. ed. 517, 39 S. Ct. 237; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 S. Ct. 678; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706, 34 S. Ct. 354; Hampton v. St. Louis I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 S. Ct. 263; Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267, 33 S. Ct. 120; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 S. Ct. 784; Garr, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 S. Ct. 236; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286; Provident Inst. for Sav. v. Malone, 221 U. S. 660, 55 L. ed. 899, 31 S. Ct. 661, 34 L.R.A.(N.S.) 1129; Engle v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 S. Ct. 594; Lee v. New Jersey, 207 U. S. 67, 52 L. ed. 106, 28 S. Ct. 22; The Winnebago (Iroquois Transp. Co. v. DeLaney, Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 S. Ct. 509; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 S. Ct. 188, 9 Ann. Cas. 736; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 S. Ct. 703; Coffey v. Noel (D. C.) 11 F. (2d) 399, citing R. C. L.; Fidelity & C. Co. v. Freeman (C. C. A. 6th) 109 F. 847, 54 L.R.A. 680; People v. Globe Grain & Mill. Co. 211 Cal. 121, 294 P. 3, citing R. C. L.; Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373; Platt v. Philbrick, 8 Cal. App. (2d) 27, 47 P. (2d) 302, citing R. C. L.; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Re Irish, 121 Kan. 72, 250 P. 1056, 61 A.L.R. 332, rehearing denied in 122 Kan. 33, 250 P. 1057, 61 A.L.R. 334; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Kansas City v. Union P. R. Co. (Kansas City v. Clark) 59 Kan. 427, 53 P. 468, 52 L.R.A. 321, affirmed

validity of a statute which affects householders only.[20] In this connection a person who has not accepted the provisions of a statute may not be within a class by whom it is assailable.[1] A corporation which has not accepted the provisions of a statute, but is operating under a prior charter, cannot raise the question as to whether such subsequent statute is constitutional as applied to corporations which have accepted it.[2]

The general rule that a statute purporting to make unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against is subject to well-defined exceptions where contingencies culminate in a grievance against persons not originally within the contemplation of the statute.[3] Under this view it has been held in one jurisdiction that where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise a constitutional question, then any person affected by the application of the statute can urge its unconstitutionality;[4] for the right to attack a statute void for discrimination is not considered to be confined to persons injured by the discrimination, but under some circumstances may be available to those injured by the legislation, even though they are not members of the unfavored class under the statute.[5]

§ 115. —Individuals Championing Class or Race.—A member of a particular class which may be discriminated against does not necessarily have the right to champion any grievance of that entire class in the absence of any actual interest which is prejudiced or impaired by the statute in question.[6] The same rule as to interest also precludes an individual from championing a group or race, and in this category has been placed the case of a man on trial for a crime objecting that the right given by statute to women to serve on the jury has been denied them by calling a panel composed entirely of men.[7] On the same principle, a white person cannot raise the question whether the exclusion of negroes from participation in the benefits of the common-school system of the state is or is not a violation of the state Constitution.[8]

If one's own property rights are involved or affected by the operation of a law, he may assail it, even though otherwise it would amount to championship of a group. Thus, where specific performance of a contract for the sale of

in 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284; Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 17 S. W. 567, 14 L.R.A. 579; Thomas v. Morton Salt Co. 258 Mich. 231, 242 N. W. 235, citing R. C. L.; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Olson v. Ross, 39 N. D. 372, 167 N. W. 385, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, Ann. Cas. 1918A, 583, L.R.A.1918B, 156, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561; State v. Haskell, 84 Vt. 429, 79 A. 852, 34 L.R.A.(N.S.) 286; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

Annotation: 19 Ann. Cas. 178; Ann. Cas. 1915C, 60.

[20] California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100.

[1] Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637.

[2] Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 44 L. ed. 673, 20 S. Ct. 545.

[3] People v. Globe Grain & Mill. Co. 211 Cal. 121, 294 P. 3, citing R. C. L.; Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

[4] Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

[5] Ibid.

[6] Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

[7] McKinney v. State, 3 Wyo. 719, 30 P. 293, 16 L.R.A. 710.

[8] Com. v. Wright, 79 Ky. 22, 42 Am. Rep. 203.

real estate to a colored person, which contract provided that he should not be required to accept a deed unless he had a right under the laws of the state and the city to occupy the property as a residence, has been denied because of the existence of an ordinance making it unlawful for any white or colored person to move into and occupy as a residence any house upon any block upon which a greater number of houses are occupied by persons of the opposite color, the vendor, though a white man, is entitled to attack the constitutionality of such ordinance notwithstanding the rule that only persons whose rights are directly affected may attack the constitutionality of a law or ordinance, because his right to sell his property is directly involved and necessarily impaired.[9]

2. Particular Classes

§ 116. Taxpayers' Actions.—In the determination of the degree of interest essential to give the requisite standing to attack the constitutionality of a statute, the general rule is that not only persons individually affected, but also taxpayers, have sufficient interest in preventing the illegal expenditure of moneys raised by taxation and may therefore question the constitutionality of statutes requiring expenditure of public moneys.[10] Similarly, taxpayers may maintain an action attacking the constitutionality of a statute which authorizes the issuing of bonds on the theory that the bonds would cast a cloud on the title to the real estate of the plaintiffs and other taxpayers owning real estate in the county, but they cannot urge the invalidity of the statute as affecting those not owning real estate or merely paying poll taxes.[11] A taxpayer may raise the question of the constitutionality of a rule of the legislature requiring a two-thirds vote to amend a budget bill,[12] and a taxpayer of a district which must pay the additional cost if a contractor for public work is released from his contract has sufficient interest to question the constitutionality of a statute purporting to authorize such a release.[13]

In some jurisdictions a different doctrine is adhered to, and no taxpayer's action can be maintained against the auditing or disbursing officers of the state in reference to the enforcement of a law alleged to be unconstitutional. It has been said that if such relief is sought, it must be in an action by the state itself, either brought by the Attorney General or, in case of his refusal, by authority of the court itself on the relation of a private citizen.[14] It has

[9] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201.

Cf. Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114, where the court held that a colored man could not assail the validity of such an ordinance where it was in effect prior to his purchase of the property.

[10] McSween v. State Live Stock Sanitary Bd. 97 Fla. 749, 122 So. 239, 65 A.L.R. 508; Americus v. Perry, 114 Ga. 871, 40 S. E. 1004, 57 L.R.A. 230; Fergus v. Brady, 277 Ill. 272, 115 N. E. 393, Ann. Cas. 1918B, 220; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Miller v. Des Moines, 143 Iowa, 409, 122 N. W. 226, 23 L.R.A.(N.S.) 815, 21 Ann. Cas. 207; Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, 146 N. W. 997, 52 L.R.A.(N.S.) 728, Ann. Cas. 1915D, 967; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583; State ex rel. Taylor v. Lord, 28 Or. 498, 43 P. 471, 31 L.R.A. 473; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; State ex rel. Fooshe v. Burley, 80 S. C. 127, 61 S. E. 255, 16 L.R.A.(N.S.) 266.

[11] Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183.

[12] Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052.

[13] Davis Constr. Co. v. Boone County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557.

[14] Molyneaux v. Amarillo Independent School Dist. (Tex. Civ. App.) 277 S. W. 185, citing R. C. L.; State ex rel. Bolens v. Frear, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L.R.A.1915B, 569, Ann. Cas. 1913A, 1147, writ of error dismissed in 231 U. S. 616, 58 L. ed. 400, 34 S. Ct. 272.

also been held under this view that the court cannot, at the instance of a taxpayer, pass upon the constitutionality of an act of the legislature providing for a revision of the state Constitution.[15]

In a recent decision bearing on this problem with reference to the Federal Government, the Supreme Court held that a taxpayer of the United States cannot bring suit to enjoin enforcement of a Federal appropriation act on the ground that it is invalid and will increase the burden of his taxes. The relationship of a taxpayer of the United States to the Federal Government is very different from the relationship of a taxpayer of a municipal corporation to the municipal government. His interest in the moneys of the Treasury, partly realized from taxation and partly from other sources, is shared with millions of others. It is comparatively minute and indeterminable. Moreover, the effect on future taxation of any payment out of the funds is so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.[16]

§ 117. Public Officers.—Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who has no interest in defeating it,[17] the question has arisen as to whether a public officer has such interest as would entitle him to question the constitutionality of a statute and refuse to comply with its provisions. It has generally been answered in the negative,[18] since the interest of such officer is official, not personal;[19] and if the rule were otherwise, petty ministerial officers of the state could ignore any law which they deemed to be invalid.[20]

15 Schieffelin v. Komfort, 212 N. Y. 520, 106 N. E. 675, L.R.A.1915D, 485.

Contra—Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.

16 Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597.

Whether the doctrine of Massachusetts v. Mellon is modified by the later decision of the Supreme Court in United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914, is the subject of a well-reasoned article by Charles S. Collier, 4 George Washington L. Rev. 211, at pp. 212–217.

17 See supra, § 111.

18 Columbia & G. R. Co. v. Miller, 283 U. S. 96, 75 L. ed. 861, 51 S. Ct. 392; Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125, 24 S. Ct. 51; People ex rel. State Bd. of Equalization v. Pitcher, 61 Colo. 149, 145 P. 812, Ann. Cas. 1918D, 1185; Franklin County v. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 18 So. 746, 47 L.R.A. 512; State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A.(N.S.) 1060; Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964; State v. Burley, 80 S. C. 127, 61 S. E. 255, 16 L.R.A.(N.S.) 266; Capito v. Topping, 65 W. Va. 587, 64 S. E. 845, 22 L.R.A.(N.S.) 1089.

19 Columbus & G. R. Co. v. Miller, 283 U. S. 96, 75 L. ed. 861, 51 S. Ct. 392; Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 S. Ct. 275; State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 18 So. 746, 47 L.R.A. 512; Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332; State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A.(N.S.) 1060; State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774; People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A. 1917B, 710; State v. Cease, 28 Okla. 271, 114 P. 251, Ann. Cas. 1912D, 151; State ex rel. Fooshe v. Burley, 80 S. C. 127, 61 S. E. 255, 16 L.R.A.(N.S.) 266; State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 519, 9 S. E. 686, 3 L.R.A. 841.

Annotation: 30 A.L.R. 379; Ann. Cas. 1912D, 152; Ann. Cas. 1918D, 1199.

20 State ex rel. Lockwood v. Tyler, 64 Mont. 124, 208 P. 1081, citing R. C. L., Mohall Farmers' Elevator Co. v. Hall, 44 N. D. 430, 176 N. W. 131, citing R. C. L.; Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964.

Annotation: 2 Ann. Cas. 81.

To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same and thus an end be put to civil government, one of the cardinal principles of which is subjection to the laws. People ex rel. State Bd. of Equalization v. Pitcher, 61 Colo. 149, 156 P. 812, Ann. Cas. 1918D, 1185. Annotation: Ann. Cas. 1918D, 1199.

This is especially true of subordinate officials. If the duty to act devolves on a superior officer who directs one of his subordinates to perform the act, the general rule is that such subordinate may not in effect review the decision and order of his superior and refuse to act merely on the ground that the law is unconstitutional. Under such circumstances, the superior, and not the subordinate, is responsible for the official act in question.[1]

The general principle that ministerial officers have no standing to raise constitutional questions has been applied in various ways. The courts have in general taken the view that a judge, even though it is his duty to interpret the laws, cannot, in a proceeding to compel the performance of some ministerial duty on his part, initiate the objection that a statute is unconstitutional where he has no personal interest involved and his duty does not require him to raise such defense.[2] Under one view, the assessment and collection of taxes are held to be purely ministerial functions, so that the assessor or collector may not, in a proceeding to enforce his obedience to a tax statute, question its constitutionality.[3] Some courts, however, have taken a contrary view, holding that the defense of the unconstitutionality of a tax statute may be properly raised as a defense to an action to compel its enforcement.[4]

The foregoing general rule is subject to the qualification that in any case in which an officer might be held personally liable for his acts, he has such an interest as entitles him to question the constitutionality of the statute, unless a court of competent jurisdiction has previously entered a judgment declaring the enactment valid.[5] There is another rule under which it is held that an officer may, in a mandamus proceeding, justify his refusal to act upon the ground that the law requiring the act is unconstitutional,[6] especially where the proceeding is one which would require the officer, under the statute in question, either to pay out public funds or provide for their disbursement by drawing an appropriate warrant, because where the duty is such that in complying with a statutory requirement the officer will violate his oath of office to support the Constitution, his official capacity gives him such an interest in the matter as will permit him, in mandamus proceedings to compel him to perform the duties imposed, to raise the question of the constitutionality of the statute as a defense.[7] This principle has been extended to the point of

1 State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834.

Annotation: 30 A.L.R. 396; Ann. Cas. 1918D, 1199.

A county official, such as an assessor, must obey the mandate of a tribunal having authority by statute to control his action, and he cannot refuse obedience by attacking the constitutionality of the statute. People ex rel. State Bd. of Equalization v. Pitcher, 61 Colo. 149, 156 P. 812, Ann. Cas. 1918D, 1185.

2 Annotation: 30 A.L.R. 397.

3 Annotation: 30 A.L.R. 398.

4 State ex rel. McCurdy v. Tappan, 29 Wis. 664, 9 Am. Rep. 622.

Annotation: 30 A.L.R. 398.

5 State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; State ex rel. Lockwood v. Tyler, 64 Mont. 124, 208 P. 1081, citing R. C. L.; Mohall Farmers' Elevator Co. v. Hall, 44 N. D. 430, 176 N. W. 131, citing R. C. L.; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

Annotation: 30 A.L.R. 389; 24 L.R.A. (N.S.) 1260; 2 Ann. Cas. 82; Ann. Cas. 1912D, 154.

6 Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989.

Annotation: 30 A.L.R. 381; 2 Ann. Cas. 82; Ann. Cas. 1918D, 1200.

For detailed discussion of this question as to public officers in mandamus proceedings, see MANDAMUS [Also 18 R. C. L. p. 108, §§ 21–24].

7 Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; State ex rel. National Conservation Exposition Co. v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C, 465; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264, 44 L.R.A.(N.S.) 83, Ann. Cas. 1914B, 1278.

Annotation: 30 A.L.R. 390.

The Comptroller of the Treasury of a state on whom is imposed the duty of paying out public moneys has the right to attack the validity of an appropriation. State

allowing an officer to question the constitutionality of acts which it is sought to make him perform, not only when the acts would be done under a statute which he deems unconstitutional, but also when the act which it is sought to require him to do is one which, though ordinarily in the regular line of his duty under a constitutional statute, is, in the particular instance, a violation of the Constitution. Thus, a state treasurer may raise the question of the constitutionality of a statute commanding him to indorse warrants at a time when the indebtedness of the state exceeds the constitutional limits.[8] There are, however, a number of cases holding that the payment of public moneys is a purely ministerial duty and that a public officer on whom such duty rests cannot defend a mandamus proceeding to compel him to make disbursements out of public funds on the ground that the statute authorizing the expenditure or allowing the claim is unconstitutional.[9]

Another exception to the general rule exists where the officer, in the discharge of his duties, is required to determine which of two different superior boards—one acting under a constitutional, and the other under an unconstitutional, statute—issuing conflicting orders has authority to direct him in the discharge of his official duties.[10]

Even in cases in which officers cannot ordinarily raise the question of constitutionality of a statute imposing ministerial duties on them, they may, under certain circumstances, act on the advice of the law officers of the state who have been elected for the purpose of advising such ministerial officers.[11]

§ 118. Aliens, Citizens as Such, Persons Not Parties.—In many ways questions have arisen where the courts have refused to permit litigants to assail the validity of legislation on the theory that they did not come within the classes possessing the necessary interest to attack the laws. Accordingly, an alien has no right to raise the constitutional question of immunities and prerogatives pertaining solely to citizens of the state.[12] A person who is not a party to a certain contract cannot raise the constitutional objection that a particular statute impairs the obligation of the contract;[13] nor can strangers who are not parties to an action raise the question of the constitutionality of a statute as impairing the rights of a party.[14] Furthermore, one brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be borne by someone else.[15] A mere citizen of a state, as such, has no right to raise the question of the

ex rel. National Conservation Exposition v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C, 465.

A public officer, such as a state auditor, when proceedings are brought to compel him to obey a statute, may question its constitutionality. Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264, 80 S. E. 367, 44 L.R.A.(N.S.) 83, Ann. Cas. 1914B, 1278.

[8] Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989.

[9] State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 18 So. 746, 47 L.R.A. 512; State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.
Annotation: 30 A.L.R. 390.

[10] State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710.

[11] State v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A.(N.S.) 1060.
Annotation: 30 A.L.R. 396; 34 L.R.A. (N.S.) 1060.

[12] Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161.

[13] Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 S. Ct. 310; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617, affirming 68 Conn. 131, 35 A. 24, 421, 48 L.R.A. 465; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Sullivan v. Berry, 83 Ky. 198, 4 Am. St. Rep. 147; Watson Seminary v. County Ct. 149 Mo. 57, 50 S. W. 880, 45 L.R.A. 675.
Annotation: 19 Ann. Cas. 180; Ann. Cas. 1915C, 61.

[14] Annotation: 19 Ann. Cas. 181; Ann. Cas. 1915C, 61.

[15] George Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. ed. 1265, 53 S. Ct. 620.

constitutionality of a statute pertaining to the expenditure of state funds;[16] and a voter cannot question the validity of a primary election law because he is an elector where it involves the rights of other electors in the state, but not his own.[17]

E. Waiver of Constitutional Rights; Waiver and Estoppel of Right to Raise Constitutional Questions

1. Waiver of Constitutional Rights

§ 119. Generally.—With certain exceptions an individual may waive constitutional provisions intended for his benefit,[18] especially when no question of public policy or public morals is involved.[19] Such waiver may be in writing[20] or by conduct amounting to an estoppel.[1] It seems that constitutional provisions intended to protect property may in all instances thus be waived.[2]

Even some of the constitutional rights intended to secure personal liberty are subjects of waiver.[3] Thus, the right to be tried by a jury, as recognized by the common law, may be waived,[4] except in some jurisdictions in capital cases[5] or where a trial by jury is guaranteed by the organic law.[6] On the other hand, statutes authorizing a waiver of jury trial in cases of misdemeanor have been upheld as constitutional.[7]

It has been broadly stated that in civil actions, privileges which rise to the dignity of constitutional or statutory rights may be waived.[8]

[16] Sutton v. Buie, 136 La. 234, 66 So. 956, L.R.A.1915D, 178.

[17] Kelso v. Cook, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68.
A voter who does not allege that he ever was registered or made any application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect requires a longer residence in the county than is required by the Constitution of the state and otherwise unreasonably impedes the exercise of the constitutional right of voting. Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. Ct. 17.

[18] Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 S. Ct. 64; Levin v. United States (C. C. A. 9th) 5 F. (2d) 598 (writ of certiorari denied in 269 U. S. 562, 70 L. ed. 412, 46 S. Ct. 21), citing R. C. L.; Robertson v. State, 94 Fla. 770, 114 So. 534, citing R. C. L.; Kentucky State Journal Co. v. Workmen's Comp. Bd. 161 Ky. 562, 162 Ky. 387, 170 S. W. 437, 1166, 172 S. W. 674, L.R.A.1916A, 389, Ann. Cas. 1916B, 1273; Ferguson v. Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350; De May v. Liberty Foundry Co. 327 Mo. 495, 37 S. W. (2d) 640, citing R. C. L.; State v. Almy, 67 N. H. 274, 28 A. 372, 22 L.R.A. 744; People v. Gowasky, 244 N. Y. 451, 155 N. E. 737, 58 A.L.R. 9; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913.
There is no such sanctity in a claim of constitutional right as prevents its being waived as any other claim of right may be. Wall v. Parrot Silver & Copper Co. 244 U. S. 407, 61 L. ed. 1229, 37 S. Ct. 609.

[19] De May v. Liberty Foundry Co. 327 Mo. 495, 37 S. W. (2d) 640, citing R. C. L.; Musco v. United Surety Co. 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851.

[20] Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

[1] Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 S. Ct. 737; Eisenhauer v. Quinn, 36 Mont. 368, 93 P. 38, 14 L.R.A.(N.S.) 435, 122 Am. St. Rep. 370.

[2] Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 S. Ct. 737; Re Baltimore Pearl Hominy Co. (C. C. A. 4th) 5 F. (2d) 553, citing R. C. L.; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459.
Annotation: 19 Ann. Cas. 182.

[3] Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676.
As to waiver of constitutional rights in criminal cases generally, see Criminal Law [Also 8 R. C. L. p. 69, § 23, p. 74, § 28; p. 77, § 31; p. 89, § 47; p. 94, § 53].

[4] Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093.
Annotation: Ann. Cas. 1914A, 873.
For a general discussion of this question, see Jury [Also 16 R. C. L. p. 217, §§ 34–36].

[5] Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620.
Annotation: 43 L.R.A. 59.

[6] State v. Rogers, 162 N. C. 656, 78 S. E. 293, 46 L.R.A.(N.S.) 38, Ann. Cas. 1914A, 867.
Annotation: Ann. Cas. 1914A, 873.

[7] Connelly v. State, 60 Ala. 89, 31 Am. Rep. 34.

[8] Butler v. Rockwell, 17 Colo. 290, 29 P. 458, 17 L.R.A. 611; State v. Lloyd, 152 Wis. 24, 139 N. W. 514, Ann. Cas. 1914C, 415.

2. Waiver or Estoppel of Right to Raise Constitutional Questions

a. Substantially

§ 120. Waiver.—Distinct from the question noted in the preceding paragraph of the waiver of constitutional rights is the matter of the waiver of the right to question the constitutionality of statutes, and it is generally recognized that this may be done.[9] A statute may expressly provide for the waiver of objections as to its constitutionality.[10] Furthermore, where the parties have agreed that a particular provision of a statute shall be waived and no step taken thereunder, the right to question the constitutionality of such provision is also waived.[11]

§ 121. Estoppel.—It is a well-recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is sought to be accomplished is per se illegal.[12] The acceptance of benefits under a statute generally precludes an attack.[13] Rights may have been secured on conditions preventing the questioning of a law. Thus, where one condition of the granting of a charter to a corporation is its acceptance of a statute, the corporation cannot thereafter question the constitutionality of such statute.[14]

Estoppel to question the constitutionality of laws applies not only to acts of the legislature, but to ordinances and proceedings of municipal corporations,[15] and may be extended to cases where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as to cases where they are attacked on

[9] Humbird v. Avery, 195 U. S. 480, 49 L. ed. 286, 25 S. Ct. 123; Detroit, Ft. W. & B. L. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736; Chicago-Sandoval Coal Co. v. Industrial Commission, 301 Ill. 389, 134 N. E. 158, citing R. C. L.; Shoal Creek Coal Co. v. Industrial Commission, 300 Ill. 551, 133 N. E. 218, citing R. C. L.; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Hayes v. Hoffman, 192 Wis. 63, 211 N. W. 271, citing R. C. L.; Booth Fisheries Co. v. Industrial Commission, 185 Wis. 127, 200 N. W. 775, citing R. C. L.

Annotation: 19 Ann. Cas. 182; Ann. Cas. 1915C, 61, 62.

[10] Quill v. Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L.R.A. 681.

[11] Gay v. Clark County, 41 Nev. 330, 171 P. 156, 173 P. 885, 3 A.L.R. 224.

[12] Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 S. Ct. 64; Dixon County v. Field, 111 U. S. 83, 28 L. ed. 360, 4 S. Ct. 315; North Dakota-Montana Wheat Growers' Asso. v. United States (C. C. A. 8th) 66 F. (2d) 573, 92 A.L.R. 1484, writ of certiorari denied in 291 U. S. 672, 78 L. ed. 1061, 54 S. Ct. 457; McMillen v. Ferrum Min. Co. 32 Colo. 38, 47 P. 461, 105 Am. St. Rep. 64; Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, 68 A.L.R. 350, affirmed in 281 U. S. 457, 74 L. ed. 962, 50 S. Ct. 382; Mills v. People's Gaslight & Coke Co. 327 Ill. 508, 158 N. E. 814, citing R. C. L.; Sutter v. People's Gaslight & Coke Co. 284 Ill. 634, 120 N. E. 562, citing R. C. L.; People ex rel. Harvey v. Vaughan, 282 Ill. 163, 118 N. E. 479, citing R. C. L.; Phillips v. Kankakee Reclamation Co. 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C, 56; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A.1918E, 202; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; United States Fidelity & G. Co. v. Ettenheimer, 70 Neb. 144, 97 N. W. 227, 99 N. W. 652, 113 Am. St. Rep. 783; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Baker v. Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783, 2 Ann. Cas. 399; Re Tarnowski, 191 Wis. 279, 210 N. W. 836, 49 A.L.R. 686.

Annotation: 104 Am. St. Rep. 790; 19 Ann. Cas. 181; Ann. Cas. 1915C, 61.

Persons who, upon the issuance of writs of attachment for contempt against them in consequence of their failure to obey subpœnas requiring them to appear before a notary for the purpose of taking their depositions, surrender to the sheriff and immediately apply for writs of habeas corpus are not in a position to raise the question whether the statute in authorizing commitment of a disobedient witness by the notary fails to afford the hearing requisite to due process. Bevan v. Krieger, 289 U. S. 459, 77 L. ed. 1316, 53 S. Ct. 661.

[13] See infra. § 123.

[14] International & G. N. R. Co. v. Anderson County, 246 U. S. 424, 62 L. ed. 807, 38 S. Ct. 370.

[15] Flowers v. Logan County, 138 Ky. 59, 127 S. W. 512, 137 Am. St. Rep. 347.

other grounds.[16] A municipality, however, which asserts that an ordinance does not and cannot limit its telephone rate-making power for the future may not successfully assert that a telephone company, having accepted and acted upon the ordinance, is estopped to claim that it is not bound by the terms of the ordinance respecting the valuation basis for rate making.[17] A municipal corporation itself may be estopped, after obtaining the benefit of a statute, from questioning its constitutionality.[18]

§ 122. —Procuring Passage of Law.—A person who in any way procures the passage of an act is generally considered as estopped and as not being entitled to question its validity.[19] It is not necessary, in order to work an estoppel, that active efforts be made to secure the passage of the statute in question.[20]

Delay generally in asserting rights is not tantamount to procuring the passage of an act. A party, by waiting until a law is passed or a regulation is made, is not estopped then to insist on his constitutional rights.[1] Nor does estoppel operate in cases affecting property rights where no one relies upon, or is misled by, the acts of those securing the passage of the law. Thus, landowners are not estopped to deny the constitutionality of a statute authorizing assessments for a local improvement, as against one who purchases, in the open market and on the advice of counsel, bonds which such assessments, if valid, will be used to pay, merely because they, or some of them, have secured the passage of the act providing for the improvement, participated in the organization of the assessment district, and in various ways proceeded under the assumption that the act was valid.[2]

§ 123. —Proceeding under Law.—Estoppel is most frequently applied in cases involving constitutional law where persons, in some manner, partake of advantages under statutes. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.[3] Cer-

[16] Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783, 2 Ann. Cas. 399.

[17] Houston v. Southwestern Bell Teleph. Co. 259 U. S. 318, 66 L. ed. 961, 42 S. Ct. 486.

[18] People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563.

[19] Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 S. Ct. 737; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A. 1918E, 202; Ferguson v. Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350; Andrus v. Board of Police, 41 La. Ann. 697, 6 So. 603, 5 L.R.A. 681, 17 Am. St. Rep. 411; Foley v. State, 157 Okla. 202, 11 P. (2d) 928, citing R. C. L.

Annotation: 19 Ann. Cas. 185.

Parties are estopped from denying the constitutionality of an illegal statute by participating in the procurement of its passage, by ratifying and acquiescing in it, by approving it after its passage, and by becoming recipients of benefits under it, although it is unconstitutional and invalid as to all other persons. There must, however, be clear evidence showing that the party sought to be estopped aided in procuring the legislation and derived benefit therefrom and that to set it aside would work a hardship or injustice on others who were misled to their prejudice into believing that the legislation was valid. Fulton County v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A.1918E, 202.

[20] Foley v. State, 157 Okla. 202, 11 P. (2d) 928, citing R. C. L.; Ross v. Lipscomb, 83 S. C. 136, 65 S. E. 451, 137 Am. St. Rep. 794.

[1] San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 233 U. S. 454, 58 L. ed. 1041, 34 S. Ct. 652.

[2] O'Brien v. Wheelock, 184 U. S. 450, 46 L. ed. 636, 22 S. Ct. 354.

[3] United Fuel Gas Co v. Kentucky R. Commission, 278 U. S. 300, 73 L. ed. 390, 49 S. Ct. 150; Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Wall v. Parrot Silver & Copper Co. 244 U. S. 407, 61 L. ed. 1229, 37 S. Ct. 609; Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 S. Ct. 737; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 S. Ct. 310; Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 S. Ct. 645; Young v. Clarendon Twp. 132 U. S. 340, 33 L. ed. 356, 10 S. Ct. 107; M'Kinney v. Carroll, 12 Pet. (U. S.) 66, 9 L. ed. 1002; North Dakota-Montana Wheat Growers' Asso. v United States (C. C. A. 8th) 66 F. (2d) 573, 92 A.L.R. 1484, writ of certiorari denied in 291 U. S. 672, 78 L. ed. 1061, 54 S. Ct. 457; Hirsh v. Block, 50 App. D. C. 56, 267 F.

tainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional.[4] This principle applies also to questioning the rules[5] or actions of state commissions.[6]

In many different ways the general doctrine has been invoked to prevent attacks on legislation. For instance, an employer who elects to accept the benefits of a Workmen's Compensation Act is estopped to attempt to escape its burdens by asserting that it is unconstitutional.[7] Also, one who has acquired property rights necessarily based upon a statute may not attack the statute as unconstitutional.[8] Nor can one who accepts a loan from the Federal Farm Board, organized under the Federal Marketing Act, question the constitutionality of the act in a proceeding to enforce a mortgage securing the loan.[9]

In some jurisdictions, a person who obtains a license under a law and seeks for a time to enjoy the benefits thereof cannot afterwards, and when the license is sought to be revoked, question the constitutionality of the act.[10] A public officer is estopped to deny the validity of a statute after he has received compensation under its terms.[11]

From the foregoing discussion, the rule naturally develops that one who invokes the provisions of a law, in proceedings or otherwise, may be denied the right to question its constitutionality.[12] Thus, one who brings a suit under

614, 11 A.L.R. 1238; Dillon v. Hamilton, 230 Ala. 310, 160 So. 708, citing R. C. L.; Arthur v. Israel, 15 Colo. 147, 25 P. 81, 10 L.R.A. 693, 22 Am. St. Rep. 381; Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, 68 A.L.R. 350, affirmed in 281 U. S. 457, 74 L. ed. 962, 50 S. Ct. 382; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A. 1918E, 202; Andrus v. Board of Police, 41 La. Ann. 697, 6 So. 603, 5 L.R.A. 681, 17 Am. St. Rep. 411; Baker v. Braman, 6 Hill (N. Y.) 47, 40 Am. Dec. 387; McDonough v. Russell-Miller Mill. Co. 47 N. D. 237, 182 N. W. 251, citing R. C. L.; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Mt. Vernon v. State, 71 Ohio St. 428, 73 N. E. 428, 104 Am. St. Rep. 783, 2 Ann. Cas. 399 (as to a municipal corporation); South Carolina W. R. Co. v. Ellen, 95 S. C. 68, 78 S. E. 963, Ann. Cas. 1915B, 1042; State ex rel. Bluemound Amusement Park v. Milwaukee, 207 Wis. 199, 240 N. W. 847, 79 A.L.R. 281; Re Tarnowski, 191 Wis. 279, 210 N. W. 836, 49 A.L.R. 686; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187, L.R.A.1916A, 374, Ann. Cas. 1915B, 997.

Annotation: 104 Am. St. Rep. 790; 137 Am. St. Rep. 375 (as to a municipal corportation); Ann. Cas. 1915B, 1049; 3 Eng. Rul. Cas. 327; 11 Eng. Rul. Cas. 92.

[4] Monamotor Oil Co. v. Johnson (D. C.) 3 F. Supp. 189 (affirmed in 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575) citing R. C. L.; Ferguson v. Landram, 5 Bush (Ky.) 230, 96 Am. Dec. 350; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Love v. McCoy, 81 W. Va. 478, 94 S. E. 954, L.R.A.1918C, 832; Re Tarnowski, 191 Wis. 279, 210 N. W. 836, 49 A.L.R. 686.

Annotation: L.R.A.1918C, 834.

[5] Brown v. Humble Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 99 A.L.R. 1107, rehearing overruled in 126 Tex. 314, 87 S. W. (2d) 1069, 101 A.L.R. 1393.

[6] United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 73 L. ed. 390, 49 S. Ct. 150.

[7] Booth Fisheries Co. v. Industrial Commission, 271 U. S. 208, 70 L. ed. 908, 46 S. Ct. 491; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187, L.R.A.1916A, 374, Ann. Cas. 1915B, 997.

[8] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

[9] North Dakota-Montana Wheat Growers' Asso. v. United States (C. C. A. 8th) 66 F. (2d) 573, 92 A.L.R. 1484, writ of certiorari denied in 291 U. S. 672, 78 L. ed. 1061, 54 S. Ct. 457.

[10] Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219.

But see Doe v. Jones, 327 Ill. 387, 158 N. E. 703, 55 A.L.R. 303, and infra, § 124.

[11] Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274.

Annotation: Ann. Cas. 1917C, 284.

[12] Eliason v. Wilborn, 281 U. S. 457, 74 L. ed. 962, 50 S. Ct. 382, affirming 335 Ill. 352, 167 N. E. 101, 68 A.L.R. 350; Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Hurley v. Commission of Fisheries, 257 U. S. 223, 66 L. ed. 206, 42 S. Ct. 83; Moor v. Texas & N. O. R. Co. (C. C. A. 5th) 75 F. (2d) 386 (writ of certiorari dismissed in 297 U. S. 101, 80 L. ed. 509, 56 S. Ct. 372) citing R. C. L.; Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238; Oren v. Swift & Co. 330 Mo. 869, 51 S. W. (2d) 59, citing R. C. L.; Ross v. Lipscomb, 83 S. C. 136, 65 S. E. 451, 137 Am. St. Rep. 794; State ex rel. Bluemound Amusement Park v. Milwaukee, 207 Wis. 199, 240 N. W. 847, 79 A.L.R. 281.

Annotation: 19 Ann. Cas. 183; Ann. Cas. 1915C, 62.

One who has voluntarily submitted his land to the operation of a Torrens Act must be deemed to have waived any right to object that a construction of the act, as making a certificate of title issued by the registrar upon a deed forged by one to whom the complainant intrusted his certificate of title, without notice to the complainant, a valid source of title, deprives him of his property without due process

a statute thereby concedes its validity.[13] A creditor who elects to avail himself of proceedings under a statute cannot raise an objection that the law does not constitutionally apply to his case.[14] A railroad company, by incorporating under a general act, is estopped to contest the validity, under the Federal Constitution, of the provisions of that act regulating railroad rates, which form one of the burdens attached by the statute to the privilege of becoming an incorporated body.[15] A landlord proceeding before the statutory commission for relief from a tenancy estops himself from subsequently questioning the constitutionality of the statute under which he proceeds.[16] A party who elects to have damages assessed by a jury in the exercise of a privilege given by statute is precluded from denying the validity of a provision of that statute for the addition of 50 per cent to the verdict.[17]

It has also been held that taking part in a proceeding which fixes liability under a law without raising any question as to the constitutionality of the law is a waiver of the right to raise that question subsequently.[18]

A party who invokes a statute cannot even in subsequent litigation aver its unconstitutionality as a defense.[19]

Where the provisions of a statute are taken advantage of and a bond required by it is filed, the estoppel to question the constitutionality of the statute extends not only to the principal but to the sureties on his bond.[20] A subcontractor, however, who joined a surety on a refunding bond taken from a highway contractor by the state, as a defendant in a suit against the contractor, is not estopped by such joinder to question the constitutionality of the statute under which the refunding bond was given where the statute, which had not then been passed upon by any court, was permissibly construable as constitutional, if as soon as it appears probable that the statute will be

of law. Eliason v. Wilborn, 335 Ill. 352, 167 N. E. 101, 68 A.L.R. 350, affirmed in 281 U. S. 457, 74 L. ed. 962, 50 S. Ct. 382.

Minority stockholders, dissenting from a sale of all the property of the corporation, who have begun a proceeding for the valuation of their stock, conformably to the Montana Revised Codes, §§ 4409–4412, thereby waive their right to challenge the validity, under United States Constitution, Fourteenth Amendment, of the provisions of those statutes, under which such a sale may be made upon a favorable vote of not less than two thirds of the outstanding capital stock, dissenting stockholders to accept an award of the value of their stock as of the date of sale. Wall v. Parrot Silver & Copper Co. 244 U. S. 407, 61 L. ed. 1229, 37 S. Ct. 609.

One who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes offend against the Constitution of the United States. United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 73 L. ed. 390, 49 S. Ct. 150.

[13] South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937.

[14] Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 S. Ct. 64; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 S. Ct. 131; Clay v. Smith, 3 Pet. (U. S.) 411, 7 L. ed. 723; Murray v. Roberts, 150 Mass. 353, 23 N. E. 208, 6 L.R.A. 346, 15 Am. St. Rep. 209; Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; Tone v. Columbus, 39 Ohio St. 281, 48 Am. Rep. 438.

[15] Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, 24 S. Ct. 310.

[16] Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238.

[17] Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 S. Ct. 645.

[18] Chicago-Sandoval Coal Co. v. Industrial Commission, 301 Ill. 389, 134 N. E. 158, citing R. C. L.; Shoal Creek Coal Co. v. Industrial Commission, 300 Ill. 551, 133 N. E. 218, citing R. C. L.; Hayes v. Hoffman, 192 Wis. 63, 211 N. W. 271, citing R. C. L.

[19] Great Falls Mfg. Co. v. Atty. Gen. (Great Falls Mfg. Co. v. Garland) 124 U. S. 581, 31 L. ed. 527, 8 S. Ct. 631; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Burlington v. Gilbert, 31 Iowa, 356, 7 Am. Rep. 143; Ferguson v. Landram, 1 Bush (Ky.) 548, later appeal in 5 Bush, 230, 96 Am. Dec. 350; Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

Annotation: 19 Ann. Cas. 183; Ann. Cas. 1915C, 62.

[20] Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Musco v. United Surety Co. 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851.

Sureties of the plaintiff in ejectment on a bond for money adjudged to the defendant for his improvements cannot assail the constitutionality of the act requiring such compensation to be made. M'Kinney v. Carroll, 12 Pet. (U. S.) 66, 9 L. ed. 1002.

given an unconstitutional construction, he promptly raises the constitutional question.[1]

The general doctrine is not applied solely on technicalities. It must rest on substantial grounds of prejudice or change of position. Therefore, the fact that an electric power company has theretofore purchased from the Federal Government electricity generated at a dam built by the government does not estop stockholders of the company suing in its right, upon the principle that one who accepts the benefit of a statute cannot be heard to question its constitutionality, to contend that a contract entered into between the company and a governmental agency for the sale of transmission lines and other property to the governmental agency, for the purchase of electricity from such agency and for mutual restrictions as to the areas to be served in the sale of power, goes beyond the constitutional powers of such governmental agency.[2] The doctrine is not extended beyond the reasonable limits of the law under which benefits have been taken. One claiming property rights under a statute is not precluded from attacking as unconstitutional a subsequent proviso inserted in the statute by amendment.[3] An insurance company, by entering the state and carrying on business there, is not barred from asserting that state legislation conflicts with the Federal Constitution.[4] Otherwise, with reference to the extent of the doctrine, it has also been held that an estoppel by acceptance of benefits does not preclude an attack upon a separable portion of the statute, although one of the conditions attached to the benefits conferred is thereby avoided.[5] The weight of authority, however, seems to be to the contrary.[6]

§ 124. Exceptions Preventing Waiver or Estoppel.—The general principles as to waiver or estoppel are subject to the important limitation that an estoppel does not necessarily extend to all the details of the statute. Thus, the acceptance of an appointment as teacher in the public schools, under general provisions of a statute, has been held not to amount to an estoppel of the right to question the provision directing the withholding of a percentage of the teachers' salaries to provide a pension fund.[7] Furthermore, the fact that one does not contest the validity of a tax does not affect his standing in court to contest proceedings for its enforcement on the ground of want of due process therein.[8] Acquiescence in a regulation which may not have been injurious does not preclude a contest of that which is injurious,[9] such as the enforcement of regulations which are violative of contract rights.[10] Nor is estoppel necessarily effected by failure to object to a law subsequent in time to the acquisition of rights. A foreign corporation, by continuing to do business in the state after the passage of an act affecting foreign corporations, does not waive the right to question the constitutionality of the statute.[11] The opposite rule applies, however, where the foreign corporation comes into the state subsequent to the enactment of legislation affecting the rights which it later acquires.[12]

The most important and frequent class of exceptions to the general doctrine of waiver or estoppel to assert the invalidity of a law is that where a statute requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive. In such cases the element of voluntary action essential to waiver or estoppel is absent.[13] For example, where the provisions of a statute are incorporated in a contract between a contractor and a municipal corporation in accordance with its mandates, the parties are not estopped or bound by such provisions in the event that the statute itself is unconstitutional.[14] An oil company which under compulsion of the statute acted as agent for the county in collecting from purchasers a tax on gasoline sold by it is not estopped to assert the subsequently adjudicated invalidity of the tax statute as a defense to a suit by the county to recover from it the money so collected.[15] The mere fact that one wishing to operate motor vehicles for hire on an interstate highway applies to the state officials for a certificate, as required by a state statute, does not prevent his assailing the statute as unconstitutional in case the certificate is denied.[16] Similarly, securing a license under a statute does not estop one from questioning the validity of the statute,[17] although as to this point some courts have reached a contrary conclusion.[18] Acceptance of benefits may not preclude attack on the

[1] International Steel & I. Co. v. National Surety Co. 297 U. S. 657, 80 L. ed. 961, 56 S. Ct. 619.

[2] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. ed. 688, 56 S. Ct. 466, rehearing denied in 297 U. S. 728, 80 L. ed. 1011, 56 S. Ct. 588.

[3] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

[4] Employers Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320, 107 A.L.R. 1413.

[5] South Carolina W. R. Co. v. Ellen, 95 S. C. 68, 78 S. E. 963, Ann. Cas. 1915B, 1042.

[6] Annotation: Ann. Cas. 1915B, 1049.

[7] Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109, 58 L.R.A. 654.

[8] Re Auditor Gen. 275 Mich. 462, 266 N. W. 464, 107 A.L.R. 279.

[9] Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 S. Ct. 118; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736.

[10] Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 S. Ct. 118.

Participation in the benefits of a voluntary assignment for creditors under a state law does not estop one from attacking the validity of a provision in the law for discharge of the debtor from his debts. Re Tarnowski, 191 Wis. 279, 210 N. W. 836, 49 A.L.R. 686.

[11] San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113, 15 P. 380, 5 Am. St. Rep. 425.

[12] In Pierce Oil Corp. v. Phœnix Ref. Co. 259 U. S. 125, 66 L. ed. 855, 42 S. Ct. 440, it was held that a foreign corporation having qualified and entered Oklahoma to do business therein long after the Constitution of the state was adopted and after the enactment of certain state statutes under which it was held to be a common carrier of oil, and required to transport through its oil pipe line wholly within the state such oil offered to it for transportation as it might have available space or capacity to transport, cannot be heard to contend that it was deprived of property thereby without due process of law in the constitutional sense.

[13] Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690, 51 S. Ct. 252; Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; Doe v. Jones, 327 Ill. 387, 158 N. E. 703, 55 A.L.R. 303; State v. Sunburst Ref. Co. 76 Mont. 472, 248 P. 186, 47 A.L.R. 969, writ of certiorari denied in 273 U. S. 722, 71 L. ed. 859, 47 S. Ct. 112; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L.R.A. 814, 82 Am. St. Rep. 605; Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259.

Annotation: 19 Ann. Cas. 185.

[14] People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L.R.A. 814, 82 Am. St. Rep. 605.

[15] Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483.

Annotation: 93 A.L.R. 1491.

A dealer in gasoline who, upon the enactment of an unconstitutional law imposing a license tax upon it, based on the quantity sold, passes the tax on to consumers cannot, upon the statute being declared unconstitutional, be held to be estopped as against the state from setting up the unconstitutionality of the enactment and to be a trustee for the state for the amount which it has collected. State v. Sunburst Ref. Co. 76 Mont. 472, 248 P. 186, 47 A.L.R. 969, writ of certiorari denied in 273 U. S. 722, 71 L. ed. 859, 47 S. Ct. 112.

[16] Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A.L.R. 286.

[17] Doe v. Jones, 327 Ill. 387, 158 N. E. 703, 55 A.L.R. 303.

The fact that one has obtained a license to practice his profession from a supervising board does not estop him from questioning the constitutionality of the statute establishing the board when charges are preferred against him which may deprive him of the certificate which the statute makes a condition precedent to the practice of his profession. Ibid.

No tender is necessary to permit a nonresident to question the validity of a state law under which higher license fees are exacted from nonresidents than residents are required to pay where a tender of less than the higher sum would be of no avail. Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 S. Ct. 366.

[18] Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219.

See also supra, § 123.

validity of an act where it is apparent that compulsion has accompanied the benefits which are accepted under protest.[19]

b. By Procedural Errors or Carelessness

§ 125. Time and Place for Raising Constitutional Questions.—A person whose rights are invaded by an act of the legislature or of an administrative board must raise the objection at the earliest available opportunity and exhaust the remedies which may have been provided for the correction of unreasonable and improper orders, before he will be permitted to make an attack in the courts on the constitutionality of the statute.[20] The failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right.[1] It should be noticed, however, that the failure to raise the question of the constitutionality of a workmen's compensation statute before a workmen's compensation commissioner will not preclude its consideration by the state Supreme Court where, when the case was pending before the commissioner, the earlier Supreme Court decision in another case, giving rise to the question, had not been handed down, and the question was raised in the trial court.[2]

The right to raise a constitutional question may also be waived by failing to take an appeal promptly.[3] On the other hand, it is also clear that a party may waive his right to question the constitutionality of a statute by proceeding under it and taking an appeal in accordance with its provisions.[4]

Another principle recognized in many jurisdictions is that the constitutionality of a statute cannot be raised for the first time in an appellate court of a state[5] or upon a rehearing in a civil case.[6] In some states where a case involves the punishment of a person for crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings on the principle that an unconstitutional law is wholly void and has no effect.[7]

[19] Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 S. Ct. 736 (water rate ordinance).

[20] Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 S. Ct. 687; Western & A. R. Co. v. Michael, 172 Ga. 561, 158 S. E. 426, citing R. C. L. approving general rule (opinion of Gilbert, J.); Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494.

The right collaterally to attack the constitutionality of a statute may be lost by failure to object to its validity when the opportunity is presented and interposing instead an objection on the merits in proceedings under the statute. Phillips v. Kankakee Reclamation Co. 178 Ind. 31, 98 N. E. 804, Ann. Cas. 1915C, 56.

[1] Union Drainage Dist. v. Smith, 233 Ill. 417, 84 N. E. 376, 16 L.R.A.(N.S.) 292; Woolley v. Mears, 226 Mo. 41, 125 S. W. 1112, 136 Am. St. Rep. 637; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494.

Annotation: 16 L.R.A.(N.S.) 292.

[2] Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426.

[3] Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 S. Ct. 389; Kahn v. Mercantile Town Mut. Ins. Co. 228 Mo. 585, 128 S. W. 995, 137 Am. St. Rep. 665.

[4] Luken v. Lake Shore & M. S. R. Co. 248 Ill. 377, 94 N. E. 175, 140 Am. St. Rep. 220, 21 Ann. Cas. 82; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L.R.A.(N.S.) 358, 134 Am. St. Rep. 316.

[5] Davis v. Industrial Commission, 297 Ill. 29, 130 N. E. 333, 15 A.L.R. 732; McDonald v. Spring Valley, 285 Ill. 52, 120 N. E. 476, 2 A.L.R. 1359; Luken v. Lake Shore & M. S. R. Co. 248 Ill. 377, 94 N. E. 175, 140 Am. St. Rep. 220, 21 Ann. Cas. 82; R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co. 236 Ill. 452, 86 N. E. 248, 23 L.R.A.(N.S.) 620, 127 Am. St. Rep. 297; Shelton v. Franklin, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537; State v. Chavez, 19 N. M. 325, 142 P. 922, Ann. Cas. 1917B, 127 (statute concerning a matter of evidence rather than a criminal offense itself); E. J. Eddy v. Fidelity & D. Co. 265 N. Y. 276, 192 N. E. 410, 96 A.L.R. 1181; Company "A," First Regiment v. Hughes, 53 N. D. 291, 205 N. W. 722, citing R. C. L.; Ideal Bakery v. Schryver, 43 Wyo. 108, 299 P. 284, citing R. C. L.

Annotation: Ann. Cas. 1915C, 62.

See also Appeal and Error, Vol. 3, p. 63, § 293.

[6] Company "A," First Regiment v. Hughes, 53 N. D. 291, 205 N. W. 722, citing R. C. L.

[7] Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; Ex parte Lewis, 45

Thus, where an act creating a crime is found to be unconstitutional, the question may be raised for the first time on appeal since the question is regarded as jurisdictional.[8] This principle extends to raising such a question on a rehearing.[9]

It is unquestioned that an alleged right under a Federal statute, not specially set up in the state court and there passed on, will not be considered by the Supreme Court of the United States on writ of error to the state court.[10] Where the entire proceedings under a statute are void because of the unconstitutionality of sections relating to the mode of procedure, it is not always necessary first to seek redress by the slow process of appeal, but the courts may permit a more speedy remedy.[11] Furthermore, in proper cases a suit may be brought at once in a Federal court without first exhausting the right of appeal to a state tribunal.[12]

The question is often presented to the courts as to whether the constitutionality of legislation may be raised in extraordinary proceedings. Although some of the courts hold that the constitutionality of a statute or ordinance is not a proper subject of investigation on habeas corpus, the weight of authority is to the effect that a court in such proceedings may inquire into the validity of the statute under which the petitioner has been convicted and sentenced and if it proves to be invalid, may discharge him.[13]

In mandamus proceedings the courts are not in accord in regard to the question as to when the constitutionality of a statute may be raised. It is generally held that the relator may attack the validity of a statute relied on by the respondent as excusing him from the performance of a duty. The respondent is generally held not to be able to raise the validity of legislation in mandamus proceedings if the act sought to be required to be done by him is ministerial or if he is a subordinate whose superior should raise the question.[14]

In prohibition proceedings it is a general rule that where the validity of legislation is involved, a writ of prohibition will not be granted in advance of a determination in the inferior court where the question is presented, when a plain remedy by appeal is afforded, even though the higher court may, when the question is presented to it, hold that the statute or ordinance is invalid. Where, however, the remedy by appeal is inadequate, prohibition lies to restrain a prosecution under a void statute, notwithstanding it is necessary to pass on the constitutionality of the statute in the prohibition proceedings.[15]

The right of a relator to attack the constitutionality of statutes in quo warranto proceedings follows no definite rule. Most of the cases where such attack has been attempted are cases involving the validity of statutes relating to taxation. Such cases exhibit very little correlation.[16] It has been held that if a statute provides that the writ shall lie as well where any person unlawfully holds or executes any office or franchise as in a case where any person shall usurp or intrude into any office or franchise, the remedy may be invoked to challenge the creation of an office with powers of taxation

Tex Crim. Rep. 1, 73 S. W. 811, 102 Am. St. Rep. 929.

[8] State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A.L.R. 1527.

[9] State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140.

[10] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581.

[11] Bell v. First Judicial Dist. Ct. 28 Nev. 280, 81 P. 875, 1 L.R.A.(N.S.) 843, 113 Am. St. Rep. 854, 6 Ann. Cas. 982.

[12] Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67.

[13] See Habeas Corpus [Also 12 R. C. L. p. 1198, § 18].

[14] See Mandamus [Also 18 R. C. L. p. 105, §§ 20 et seq.].

As to when officers may question validity of a statute, see supra, § 117.

[15] See Prohibition [Also 22 R. C. L. p. 13, § 11].

[16] Annotation: 109 A.L.R. 826.

because, although there may have been no unlawful usurpation or intrusion, there is an unlawful holding and executing of an office if the law by which it is claimed to have been created is unconstitutional.[17] In most of the cases, however, it has been held that quo warranto is not the proper method to challenge the validity of a statute where official acts have been performed by virtue of such a statute.[18] In one jurisdiction the court has avoided directly passing upon the question, stating that even if it is conceded that quo warranto might possibly lie, basing an attack on the validity of an act as a whole, it cannot lie for the purpose of compelling a respondent officer to enforce the provisions of a statute in accordance with the relator's construction of their meaning and effect.[19]

F. Pleading and Admissions

§ 126. Pleading.—There are many authorities which state that the constitutionality of a law will not be considered unless the point is specially pleaded,[20] although the view has been taken that it is unnecessary to plead unconstitutionality specially where an attack is made on the constitutionality of a statute or ordinance of a municipal corporation.[1] In any event a party should, by proper averments, bring himself within the scope of the act and show the feature of it which would injure him.[2] Thus, a voter who does not allege that he ever was registered or ever made any application to be registered is not in a position to impugn the constitutionality of a statute regulating the registration of voters.[3] A complaint in a suit to enjoin the enforcement of a regulation made in the exercise of the police power is not rendered sufficient by allegations which are merely general conclusions of law or fact, but must set forth the facts relied upon to rebut the presumption of constitutionality.[4] One who is not shown to be a nonresident cannot raise the question whether a municipal ordinance discriminates against citizens of other states.[5]

It is a fairly well-established rule that the constitutionality of a statute may be generally raised by demurrer.[6] The rule is more accurately stated in a decision pointing out that when a complaint states in form a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer.[7] Where this mode of attack is employed, it seems that under the rule adopted by some of the courts, it is not necessary for the demurrer to specify the particular grounds on which the constitutionality of the statute is attacked,[8] for in some jurisdictions apparently a general demurrer is sufficient for such a purpose, while in others it has been held that

17 Annotation: 109 A.L.R. 326.

18 Annotation: 109 A.L.R. 326.

19 State ex rel. Adams v. Lee, 126 Fla. 396, 171 So. 333, 109 A.L.R. 319.

20 Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853; Barber v. Louisiana R. & Nav. Co. 141 La. 1059, 76 So. 199, L.R.A.1917F, 802.

1 Adkins v. Richmond, 98 Va. 91, 34 S. E. 967, 81 Am. St. Rep. 705.

2 Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 S. Ct. 40; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 S. Ct. 784; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20.

3 Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 S. Ct. 17.

4 Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853.

5 Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386.

6 Beauvoir Club v. State, 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 82; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Adkins v. Richmond, 98 Va. 91, 34 S. E. 967, 47 L.R.A. 583, 81 Am. St. Rep. 705.

Annotation: 71 A.L.R. 1194.

7 State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190.

8 Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324.

the particular section of the Constitution alleged to be violated must be specifically indicated.[9] On a demurrer to a bill, a law attacked as unconstitutional is to be tested as to its validity by its language in light of such matters as are subject of judicial notice.[10]

§ 127. Admissions and Stipulations.—In the consideration of attempts to fix the validity of legislation by admission or agreement, the principle should be kept in mind that the constitutionality of any act is a question of law for the court, and not a matter of fact for a jury or for private parties.[11] This question affects the rights of the public generally, as well as the rights of parties to a particular proceeding.[12] For this reason courts should be careful not to declare legislative acts unconstitutional on agreed and general statements and without the fullest disclosure of all material facts.[13]

It has very generally been held that stipulations that particular statutes of the state are invalid, as well as stipulations as to the steps taken in the passing of statutes and stipulations as to their construction, which in effect amount to stipulations of invalidity, are without binding effect.[14] The courts have constantly refused to allow litigants, either specifically or by admissive conduct to agree privately as to the constitutionality of statutes. This principle has been expressed in the rule that a judgment of invalidity of a statute cannot be predicated on an admission.[15] In other words, the court will not declare a statute to be unconstitutional because facts showing its unconstitutionality are alleged in the pleading of one party and admitted by the other.[16] A party cannot admit the invalidity of a law by a failure to deny an allegation that it was not constitutionally enacted.[17]

The parties cannot stipulate as to the interpretation of the Constitution. Thus, a stipulation that a particular provision of the Constitution does not apply to the case will not bind the court. Similarly, a stipulation as to when a constitutional amendment went into effect is of no validity.[18] There is

9 Annotation: 71 A.L.R. 1194–1196.

10 McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508.

The question of the constitutionality of a public law, such as the Illinois Employees' Compensation Act, cannot be determined simply on the pleadings, on demurrer to a pleading alleging that the bill for the act and the amendments thereto were not printed, as required by the Constitution, before vote on the final passage, and purporting to set out all the entries and proceedings concerning the bill shown by the senate and house journals, but the court should require proof of each step taken by the legislature, before passing on the demurrer, or should strike the demurrer from the files and require a joinder of issue. Nakwosas v. Western Paper Stock Co. 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467.

As to judicial notice and evidence, see infra, § 145.

11 Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A. 1915D, 458.

See infra, § 143.

12 Nakwosas v. Western Paper Stock Co. 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467.

13 Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 S. Ct. 400.

14 Adams v. Clark, 36 Colo. 65, 85 P. 642, 10 Ann. Cas. 774; E. Fougera & Co. v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; State ex rel. Weldon v. Thomason, 142 Tenn. 527, 221 S. W. 491, citing R. C. L.

Annotation: 92 A.L.R. 667, 668.

In the determination of whether a statute is valid by reason of having been duly submitted to a referendum vote of the people, the court is not bound by stipulations of parties as to the official action taken in connection therewith. Allen v. State, 14 Ariz. 458, 130 P. 1114, 44 L.R.A.(N.S.) 468.

A stipulation that a statute regulating the length of truck-semitrailer combinations excludes from the highways a combination safer than the types permitted is not, even though one of the parties is the state, conclusive that the statute has no reasonable relation to public safety on the highways. State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

15 State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393.

16 Nakwosas v. Western Paper Stock Co. 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467.

Annotation: Ann. Cas. 1914D, 468.

17 Adams v. Clark, 36 Colo. 65, 85 P. 642, 10 Ann. Cas. 774.

18 Annotation: 92 A.L.R. 670.

some minority inclination, on the other hand, to uphold stipulations that legislation is valid.[19]

G. Presumptions as to Constitutionality

§ 128. Generally.—The basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. In a great volume of cases the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment.[20] Thus,

[19] Annotation: 92 A.L.R. 669.

[20] **United States.**—Becker Steel Co. v. Cummings, 296 U. S. 74, 80 L. ed. 54, 56 S. Ct. 15; Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Life & C. Ins. Co. v. Barefield, 291 U. S. 575, 78 L. ed. 999, 54 S. Ct. 486, rehearing denied in 292 U. S. 600, 78 L. ed. 1464, 54 S. Ct. 627; Life & C. Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987, 54 S. Ct. 482, rehearing denied in 292 U. S. 600, 78 L. ed. 1464, 54 S. Ct. 627; Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Missouri P. R. Co. v. Norwood, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 453; O'Gorman v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163; Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397; Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Euclid v. Ambler Realty Co. 272 U. S. 364, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Dane v. Jackson, 256 U. S. 589, 65 L. ed. 1107, 41 S. Ct. 566; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 S. Ct. 734, L.R.A.1918C, 283; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D 642 affirming 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A. (N.S.) 1097; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819; United States v. Duell, 172 U. S. 576, 43 L. ed. 559, 19 S. Ct. 286; Walker v. Pennsylvania, 127 U. S. 699, 32 L. ed. 261, 8 S. Ct. 997; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 922, 1257, affirming 114 Pa. 265, 7 A. 913, 60 Am. Rep. 350; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Cooper v. Telfair, 4 Dall. 14, 1 L. ed. 721; Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 563, 74 L. ed. 625, 50 S. Ct. 24; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788.

Alabama.—Frazier v. State Tax Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; State v. Alabama Fuel & Iron Co. 188 Ala. 487, 66 So. 169, L.R.A. 1915A, 185; Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A.1915D, 98; Ex parte Owens, 148 Ala. 402, 42 So. 676, 8 L.R.A.(N.S.) 888, 121 Am. St. Rep. 67; Mobile Dry Docks Co. v. Mobile, 146 Ala. 198, 40 So. 205, 3 L.R.A.(N.S.) 882, 9 Ann. Cas. 1229; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98.

Arizona.—Atchison, T. & S. F. R. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Allen v. State, 14 Ariz. 458, 130 P. 1114, 44 L.R.A.(N.S.) 468.

Arkansas.—Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; St. Louis & S. F. R. Co. v. Heyser, 95 Ark. 412, 130 S. W. 562, Ann. Cas. 1912A, 610.

California. — Gillum v. Johnson, 7 Cal. (2d) 744, 62 P. (2d) 1037, 63 P. (2d) 810, 108 A.L.R. 595; Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Johnson v. Gentry, 220 Cal. 231, 30 P. (2d) 400, 92 A.L.R. 1264; Pacific Indem. Co. v. Industrial Acci. Commission, 215 Cal. 461, 11 P. (2d) 1, 82 A.L.R. 1170; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 956, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199; Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 20 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106; People ex rel. Morgan v. Hayne, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348, 17 Am. St. Rep. 217; Miller v. Dunn, 72 Cal. 462, 14 P. 21, 1 Am. St. Rep. 67.

Colorado.—Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; Denver v. Knowles, 17 Colo. 204, 30 P. 1041, 17 L.R.A. 135.

Connecticut.—Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452, affirmed in 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Derby Turnp. Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700.

Dakota.—Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355.

Delaware. — Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203; Wilmington v. Ewing, 2 Penn. 66, 43 A. 305, 45 L.R.A. 79; Frieszleben v. Shallcross, 9 Houst. 1, 19 A. 576, 8 L.R.A. 337; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. 389, 44 Am. Dec. 593.

Florida.—State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Escambia County v. Pilot Comrs. 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196; State ex rel. Andreu v. Canfield, 40 Fla. 36, 23 So. 591, 42 L.R.A. 72.

Georgia.—Cooper v. Rollins, 152 Ga. 538, 110 S. E. 726, 20 A.L.R. 1105; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902; Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L.R.A.(N.S.) 20, affirmed in 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; Howell v. State, 71 Ga. 224, 51 Am. Rep. 259; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717; Flint River St. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

Hawaii.—Bannister v. Lucas, 21 Haw. 222, Ann. Cas. 1916A, 1136.

Illinois.—Chicago v. Ames, 365 Ill. 529, 7 N. E. (2d) 294, 109 A.L.R. 1509; People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; People v. Munroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; People v. Flerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Lane v. Doe, 4 Ill. 238, 36 Am. Dec. 543.

Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186, 70 A.L.R. 1232; State ex rel. Nejdl v. Bowman, 199 Ind. 436, 156 N. E. 394, 157 N. E. 723, citing R. C. L. (concurring opinion); Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; Kraus v. Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L.R.A. 504; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 602; Anderson v. Caldwell, 91 Ind. 451, 46 Am. Rep. 613; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391; Doe ex dem. Chandler v. Douglass, 8 Blackf. 10, 44 Am. Dec. 732.

Iowa.—Elk River Coal & Lumber Co. v. Funk, — Iowa, —, 271 N. W. 204, 110 A.L.R. 1415; Flood v. City Nat. Bank, 218 Iowa, 898, 253 N. W. 509, 95 A.L.R. 1168; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; Schultz v. Parker, 158 Iowa, 42, 139 N. W. 173, Ann. Cas. 1915D, 553; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; McCormick v. Rusch, 15 Iowa, 127, 83 Am. Dec. 487.

Kansas.—State ex rel. Coleman v. Kelly, 71 Kan. 811, 81 P. 450, 70 L.R.A. 450, 6 Ann. Cas. 298; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.—Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Lawton v. Stewart Dry Goods Co. 197 Ky. 394, 247 S. W. 14, 26 A.L.R. 687; Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115, 45 L.R.A.(N.S.) 1101, Ann. Cas. 1915C, 493; Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S. W. 762, 16 L.R.A.(N.S.) 479; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 11 Am. St. Rep. 219; Louisville v. Hyatt, 2 B. Mon. 177, 36 Am. Dec. 594; Bliss v. Com. 2 Litt. 90, 13 Am. Dec. 251.

Louisiana.—New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A.1917E, 761, Ann. Cas. 1918B, 1032; State v. Rose, 125 La. 462, 51 So. 496, 26 L.R.A.(N.S.) 821; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 La. Ann. 1679, 18 So. 746, 47 L.R.A. 512; New Orleans v. Robira, 42 La. Ann. 1098, 8 So. 402, 11 L.R.A. 141; Johnson v. Duncan, 3 Mart. 530, 6 Am. Dec. 675.

Maine.—Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; State v. Poulin, 105 Me. 224,

the presumption of constitutionality of a statute dealing with a subject clearly

within the scope of the police power prevails in the absence of some factual

74 A. 119, 24 L.R.A.(N.S.) 408, 134 Am. St. Rep. 543; Ulmer v. Lime Rock R. Co. 98 Me. 579, 57 A. 1001, 66 L.R.A. 387.

Maryland.—Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; Cochran v. Preston, 108 Md. 220, 70 A. 113, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Davis v. Helbig, 27 Md. 452, 92 Am. Dec. 646; Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

Massachusetts.—Ahmed's Case, 278 Mass. 180, 179 N. E. 684, 79 A.L.R. 669; Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304; Com. v. Snow, 269 Mass. 598, 169 N. E. 542, 68 A.L.R. 920; Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B. 658; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 73 N. E. 530, 11 L.R.A.(N.S.) 973, 2 Ann. Cas. 419, affirmed in 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555; Moore v. Sanford, 151 Mass. 285, 24 N. E. 323, 7 L.R.A. 151; Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

Michigan.—Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Burt v. Munising Woodenware Co. 222 Mich. 699, 193 N. W. 895, citing R. C. L.; Fremont Canning Co. v. Waters, 209 Mich. 178, 176 N. W. 577, citing R. C. L.; People v. Gansley, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E, 165; Detroit v. Inspectors of Flection, 139 Mich. 548, 102 N. W. 1029, 69 L.R.A. 184, 111 Am. St. Rep. 430, 5 Ann. Cas. 861; People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L.R.A. 853, 62 Am. St. Rep. 715; People ex rel. Hart v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L.R.A. 609.

Minnesota.—Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507, affirmed in 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A. 1916D. 412; Kanne v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 137 N. W. 170, 41 L.R.A.(N.S.) 1041; State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; State v. Brown, 97 Minn. 402, 106 N. W. 477, 5 L.R.A.(N.S.) 327.

Mississippi.—University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437; State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152, 5 L.R.A.(N.S.) 340; Newsom v. Cocke, 44 Miss. 352, 7 Am. Rep. 686; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311.

Missouri.—State ex rel. Barker v. Merchants' Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 148, 186 S. W. 1007, Ann. Cas. 1918E, 620; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; State ex rel. Atlantic Horse Ins. Co. v. Blake, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913C, 1283; State ex rel. Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A.(N.S.) 1060; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; Ordelheide v. Modern Brotherhood, 226 Mo. 203, 125 S. W. 1105, 32 L.R.A.(N.S.) 965; State v. Hamey, 168 Mo. 167, 67 S. W. 620, 57 L.R.A. 846; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487, writ of error dismissed in 187 U. S. 356, 47 L. ed. 214, 23 S. Ct. 137; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393; Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L.R.A. 622; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

Montana.—Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294; Lewis & Clark County v. Industrial Acci Bd. 52 Mont. 6, 155 P. 268, L.R.A.1916D, 628; State ex rel. Peyton v. Cunningham, 39 Mont. 197, 103 P. 497, 18 Ann. Cas. 705; State ex rel. Nolan v. Montana R. Co. 21 Mont. 221, 53 P. 623, 45 L.R.A. 271; Territory v. Burgess, 8 Mont. 57, 19 P. 558, 1 L.R.A. 808.

Nebraska.—Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.; Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, 24 L.R.A.(N.S.) 1104; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; State v. Standard Oil Co. 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

Nevada.—State ex rel. Riggle v. Brodigan, 37 Nev. 492, 143 P. 233, L.R.A.1915B, 197; Nash v. McNamara, 30 Nev. 114, 93 P. 405, 16 L.R.A.(N.S.) 168, 133 Am. St. Rep. 694; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; State ex rel. Winnie v. Stoddard, 25 Nev. 452, 62 P. 237, 51 L.R.A. 229.

New Hampshire.—State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A.1916A, 950; State v. Marshall, 64 N. H. 549, 15 A. 210, 1 L.R.A. 51; Dow v. Norris, 4 N. H. 16, 17 Am. Dec. 400.

New Jersey.—State v. Dolbow, 117 N. J. L. 560, 189 A. 915, 109 A.L.R. 1488; Hart v. Scott, 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86.

New York.—Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815, 109 A.L.R. 1229, rehearing denied in 273 N. Y. 528, 7 N. E. (2d)

677; Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809, L.R.A.1917E, 549, Ann. Cas. 1917B, 273; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L.R.A. 247; People ex rel. Henderson v. Westchester County, 147 N. Y. 1, 41 N. E. 563, 30 L.R.A. 74; People ex rel. Kemmler v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417.

North Carolina.—Maxwell v. Kent-Coffey Mfg. Co. 204 N. C. 365, 168 S. E. 397, 90 A.L.R. 476; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; Atty.-Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 893, Ann. Cas. 1917D, 517; State v. Lewis, 142 N. C. 626, 55 S. E. 600, 7 L.R.A.(N.S.) 669, 9 Ann. Cas. 604; State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; McGwigan v. Wilmington & W. R. Co. 95 N. C. 428, 59 Am. Rep. 247; Den ex dem. University of North Carolina v. Foy, 5 N. C. (1 Murph.) 58, 3 Am. Dec. 672.

North Dakota.—State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 113, 86 A.L.R. 1523; State v. Ligaarden, 59 N. D. 475, 230 N. W. 729, 70 A.L.R. 196; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State v. Crawford, 36 N. D. 385, 162 N. W. 718, Ann. Cas. 1917E, 955; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583.

Ohio.—Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; L. & M. Invest. Co. v. Cutter, 125 Ohio St. 12, 180 N. E. 379, 86 A.L.R. 707; Prentiss v. Dittmer, 93 Ohio St. 314, 112 N. E. 1021, L.R.A.1917B, 191; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785; State v. Gardner, 54 Ohio St. 24, 42 N. E. 999, 31 L.R.A. 660; State v. Bargus, 53 Ohio St. 94, 41 N. E. 245, 53 Am. St. Rep. 628; State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L.R.A. 729; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289.

Oklahoma.—State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; State ex rel. Short v. Johnson, 90 Okla. 21, 215 P. 945, citing R. C. L.; Stout v. State, 36 Okla. 744, 130 P. 553, 45 L.R.A.(N.S.) 884, Ann. Cas. 1916E, 858; State ex rel. Cruce v. Cease, 28 Okla. 271, 114 P. 251, Ann. Cas. 1912D, 151; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008.

Oregon.—State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Stetter v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A. 1917C, 944, Ann. Cas. 1916A, 217; Pacific Mill. & Elevator Co. v. Portland, 65 Or. 349, 133 P. 72, 46 L.R.A.(N.S.) 363; Philomath College v. Wyatt, 27 Or. 390, 31 P. 296, 37 P. 1022, 26 L.R.A. 68; Cook v. Portland, 20 Or. 580, 27 P. 263, 13 L.R.A. 533.

Pennsylvania.—Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Re Lancaster City's Fifth Ward Election, 281 Pa. 131, 126 A. 199, 35 A.L.R. 815; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E, 1324; Com. v. Herr, 229 Pa. 132, 78 A. 63, Ann. Cas. 1912A, 422; Russ v. Com. 210 Pa. 544, 60 A. 169, 1 L.R.A.(N.S.) 409, 105 Am. St. Rep. 825; DeWalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771, 28 Am. St. Rep. 814; Pennsylvania R. Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360; Com. v. Erie R. Co. 62 Pa. 286, 1 Am. Rep. 399, reversed on other grounds in 15 Wall. (U. S.) 232, 21 L. ed. 146; Harvey v. Thomas, 10 Watts, 63, 36 Am. Dec. 141; Com. v. Fye, 9 Pa. D. & C. 32, citing R. C. L.

Rhode Island.—Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

South Carolina.—Ex parte Berry, 84 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344; Kirk v. Bd. of Health (Kirk v. Wyman) 83 S. C. 372, 65 S. E. 387, 23 L.R.A.(N.S.) 1188; Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410; Ex parte Bacot, 36 S. C. 125, 15 S. E. 204, 16 L.R.A. 586; Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6.

South Dakota.—Payne v. Jones, 47 S. D. 488, 199 N. W. 472, citing R. C. L.; Re McKennan 25 S. D. 369, 126 N. W. 611, 33 L.R.A.(N.S.) 606; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187, 91 Am. St. Rep. 674.

Tennessee.—Corn v. Fort, 170 Tenn. 377, 95 S. W. (2d) 620, 106 A.L.R. 647; Hunter v. State, 158 Tenn. 63, 12 S. W. (2d) 361, 61 A.L.R. 1148; State ex rel. National Conservation Exposition Co. v. Woollen, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915C, 465; Yancy v. Yancy, 5 Heisk. 353, 13 Am. Rep. 5; Andrews v. State, 3 Heisk. 165, 8 Am. Rep. 8; Louisville & N. R. Co. v. County Ct. 1 Sneed, 637, 62 Am. Dec. 424; Tate v. Bell, 4 Yerg. 202, 26 Am. Dec. 221; Bank of State v. Cooper, 2 Yerg. 599, 24 Am. Dec. 517.

Texas.—St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 7 S. W. 703, L.R.A.1917B, 1108; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Ex parte Sepulveda, 108 Tex. Crim. Rep. 533, 2 S. W. (2d) 445, citing R. C. L.; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Utah.—Tintic Standard Min. Co. v. Utah County, 80 Utah. 491, 15 P. (2d) 633, citing R. C. L.; Rio Grande Lumber Co. v. Darke, 50 Utah. 114, 167 P. 241, L.R.A.1918A, 1193; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah. 369, 98 P. 180, 28 L.R.A.(N.S.) 255, 131 Am. St. Rep. 859; Highland Boy Gold Min. Co. v. Strickley, 28 Utah. 215, 78 P. 296, 1 L.R.A.(N.S.) 976, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110, affirmed in 200 U. S. 527, 50 L. ed. 581, 26 S. Ct. 301, 4 Ann. Cas. 1174; Block v. Schwartz, 27 Utah. 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; State v. Holden, 14 Utah, 71,

foundation of record for declaring it to be unreasonable.[21] The rule governs the application of a general act to specific items. For instance, in passing upon the sufficiency of the title of a general appropriation act every reasonable presumption supporting its sufficiency is peculiarly entitled to application, even in a case in which the validity of a single item is in question.[1] The rule governs each part of severable laws and attaches to each separate part of a statute which is being questioned.[2] Moreover, statutes enacted as initiative measures enjoy the same presumption of validity as do statutes enacted in the usual way.[3]

The general principle has been expressed in many different forms. It has been declared that in no doubtful case should the courts pronounce legislation to be contrary to the Constitution;[4] that to doubt the constitutionality of a

46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

Vermont.—Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 994, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; Kellogg v. Page, 44 Vt. 356, 8 Am. Rep. 383.

Virginia.—Richmond v. Carneal, 129 Va. 388, 106 S. E. 403, 14 A.L.R. 1341; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Southern Exp. Co. v. Goldberg, 101 Va. 619, 44 S. E. 893, 62 L.R.A. 669; Com. v. Brown, 91 Va. 762, 21 S. E. 357, 28 L.R.A. 110; Miller v. Com. 88 Va. 618, 14 S. E. 161, 342, 979, 15 L.R.A. 441; Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

Washington.—Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998; Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; State v. Van Vlack, 101 Wash. 503, 172 P. 563, L.R.A.1918E, 108; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 P. 651, 35 L.R.A.(N.S.) 802; State ex rel. Shepard v. Superior Ct. 60 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925.

West Virginia.—State v. Page, 100 W. Va. 166, 130 S. E. 426, 44 A.L.R. 501; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A. 1917D, 1040; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.—State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

Wyoming. — Taxpayers' League v. McPherson, 49 Wyo. 251, 54 P. (2d) 897, 106 A.L.R. 767; State ex rel. Voiles v. Johnson County High School, 43 Wyo. 494, 5 P. (2d) 255, citing R. C. L.; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

Annotation: 46 Am. St. Rep. 734; 51 Am. St. Rep. 192; 62 Am. St. Rep. 720.

State laws are presumed not to be at variance with the Federal Constitution. Missouri P. R. Co. v. Norwood, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 458.

The presumption of constitutionality attaches to apportionment acts in the same manner that it does to any other act of the legislature, and any doubt as to the power of the legislature to pass the particular act must result in a finding that the act is within the legislative power. Annotation: 2 A.L.R. 1342, 1343.

[21] O'Gorman & Young v. Hartford F. Ins. Co 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163.

[1] Borden v. Louisiana State Bd. of Ed. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183.

[2] Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274.

In Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838, the court, in pointing out a rule followed in some jurisdictions which is apparently contrary to the principle stated in the text rule, inasmuch as it holds that once part of a statute is held invalid, no presumption of constitutionality attaches to the remainder, said: ". . . when a statute has been once emasculated, these presumptions no longer obtain in support of the remainder. It should then be manifestly clear that the remaining portion can stand by itself, and that the legislature did not intend that such portion should be controlled and modified in its construction and effect by the rejected part."

As to the rules governing the constitutionality of severable laws generally, see infra, §§ 152 et seq.

[3] Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304.

[4] Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 S. Ct. 553; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Mobile Dry Docks Co. v. Mobile, 146 Ala. 198, 40 So. 205, 3 L.R.A.(N.S.) 822, 9 Ann. Cas. 1229; Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Chicago v. Ames, 365 Ill. 529, 7 N. E. (2d) 294, 109 A.L.R. 1509; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A.1917B, 808; State ex rel. Davening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A.L.R. 1562, writ of error dismissed in 248 U. S. 592, 63 L. ed. 436, 39 S. Ct. 21; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Burt v. Munising Woodenware Co. 222 Mich. 699, 193 N. W.

law is to resolve every or all doubt in favor of its validity;[5] that all statutes

895, citing R. C. L.; People v. Gansley, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E, 165; State v. De Lorenzo, 81 N. J. L. 613, 79 A. 839, Ann. Cas. 1912D, 329; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Lynn v. Nichols, 122 Misc. 170, 202 N. Y. S. 401 (affirmed in 210 App. Div. 812, 205 N. Y. S. 935), citing R. C. L.; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State v. Nelson County, 1 N. D. 88, 45 N. W. 33, 8 L.R.A. 283, 26 Am. St. Rep. 609; Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238), citing R. C. L.; Wingfield v. South Carolina Tax Commission, 147 S. C. 116, 144 S. E. 846, citing R. C. L.; Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145; Com. v. Brown, 91 Va. 762, 21 S. E. 357, 28 L.R.A. 110; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

In case of real doubt as to unconstitutionality, a law must be sustained. Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555.

Mere doubt as to the constitutionality of a statute will not warrant the court in declaring it unconstitutional; there must be something near to certainty. Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431.

In case of doubt as to the existence of conflict between a statute and the Constitution, the statute will prevail. People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85.

A state statute should be declared constitutional where the repugnancy is doubtful merely. Per Thompson, J., Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606.

If the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016.

[5] **United States.** — Toombs v. Citizens Bank, 281 U. S. 643, 74 L. ed. 1088, 50 S. Ct. 434; Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397; Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 S. Ct. 553; Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; Thomas v. Wabash, St. L. & P. R. Co. (C. C.) 40 F. 126, 7 L.R.A. 145.

Alabama.—Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A.1915D, 98; State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436.

Arkansas.—Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; State ex rel. Kimberlite Diamond Min. & Washing Co. v. Hodges, 114 Ark. 155, 169 S. W. 942, L.R.A.1916F, 122.

California.—Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148.

Florida.—State ex rel. Lamar v. Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124.

Georgia.—Milliron v. Harrison, 175 Ga. 764, 166 S. E. 231, 84 A.L.R. 1142.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

Illinois.—People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1509; People v. Guagliata, 362 Ill. 427, 200 N. E. 169, 103 A.L.R. 1035; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27.

Indiana. — Ehle v. State, 191 Ind. 502, 133 N. E. 748, citing R. C. L.; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A. (N.S.) 1190; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469.

Iowa. — Flood v. City Nat. Bank, 218 Iowa, 898, 253 N. W. 509, 95 A.L.R. 1168; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; State ex rel. Witter v. Forkner, 94 Iowa, 1, 62 N. W. 772, 28 L.R.A. 206.

Kentucky. — Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Dwiggins Wire Fence Co. v. Patterson, 166 Ky. 278, 179 S. W. 224, citing R. C. L.; Simrall v. Covington, 90 Ky. 444, 14 S. W. 369, 9 L.R.A. 556, 29 Am. St. Rep. 398.

Maine. — Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194; Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A. (N.S.) 1143, Ann. Cas. 1916C, 734; State ex rel. Young v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

Minnesota. — State ex rel. Childs v. Copeland, 66 Minn. 315, 69 N. W. 27, 34 L.R.A. 777, 61 Am. St. Rep. 410.

Mississippi. — United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88; University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851.

Missouri. — State ex rel. Barker v. Merchants Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477.

Montana. — State ex rel. DuFresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581.

Nebraska.—Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.; Cleland v. Anderson, 66 Neb. 252, 75 Neb. 273, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092, 5 L.R.A.(N.S.) 136.

New Jersey.—State, Paul, Prosecutor, v.

are of constitutional validity unless they are shown to be invalid,[6] and that the courts will resolve every reasonable doubt in favor of the validity of the enactment.[7] It has been said that every intendment is in favor of its validity,

Circuit Judge, 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86.

New York. — Johnson v. New York, 274 N. Y. 411, 9 N. E. (2d) 30, 110 A.L.R. 1502; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579; Lynn v. Nichols, 122 Misc. 170, 202 N. Y. S. 401 (affirmed in 210 App. Div. 812, 205 N. Y. S. 935), citing R. C. L.

North Carolina. — Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247.

North Dakota. — State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838.

Oregon.—Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165, affirmed in 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430.

Pennsylvania. — Com. v. Erie R. Co. 62 Pa. 286, 1 Am. Rep. 399, reversed on other grounds in 15 Wall. (U. S.) 232, 21 L. ed. 146; Com. v. Fye, 9 Pa. D. & C. 32, citing R. C. L.

Rhode Island. — State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339; Carr v. Brown, 20 R. I. 215, 38 A. 9, 38 L.R.A. 294, 78 Am. St. Rep. 855.

South Carolina. — Gregg Dyeing Co. v. Query, 166 S. C. 117, 164 S. E. 588, citing R. C. L.; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238), citing R. C. L.; Wingfield v. South Carolina Tax Commission, 147 S. C. 116, 144 S. E. 846, citing R. C. L.; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410; overruled on another point in State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

Texas. — St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A. 1917B, 1108; Ex parte Sparks, 108 Tex. Crim. Rep. 619, 2 S. W. (2d) 449, citing R. C. L.; Ex parte Sepulveda, 108 Tex. Crim. Rep. 533, 2 S. W. (2d) 445, citing R. C. L.; Ex parte Mode, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918E, 845.

Utah. — Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193.

Virginia. — Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114.

Washington. — State ex rel. State Reclamation Bd. v. Clausen (State ex rel. Chase v. Clausen) 110 Wash. 525, 188 P. 538, 14 A.L.R. 1133; State ex rel. Case v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231.

West Virginia. — Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; Duncan v. Baltimo e & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272.

Wisconsin. — Milwaukee Electric R. & Light Co. v. Railroad Commission, 153 Wis. 592, 142 N. W. 491, L.R.A.1915F, 744, Ann. Cas. 1915A, 911, affirmed in 238 U. S. 174, 59 L. ed. 1254, 35 S. Ct. 820.

Where more than one reasonable meaning of a constitutional provision exists, it is the duty of the courts, in determining the constitutionality of a statute, to accept that chosen by the legislature. Pacific Indem. Co. v. Industrial Accl. Commission, 215 Cal. 461, 11 P. (2d) 1, 82 A.L.R. 1170.

Doubts as to the constitutionality of statutes, though arising from a prior decision, should always be resolved in favor of constitutionality. Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83.

[6] Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Lane v. Doe, 4 Ill. 238, 36 Am. Dec. 543; Louisville v. Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Williamson v. Williamson, 3 Smedes & M. (Miss.) 715, 41 Am. Dec. 636; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.

Annotation: 36 Am. Dec. 600.

[7] James Everard's Breweries v. Day, 265 U. S. 545, 68 L. ed. 1174, 44 S. Ct. 628; Pine Grove Twp. v. Talcott, 19 Wall. (U. S.) 673, 22 L. ed. 227; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Chicago & N. W. R. Co. v. Dey (C. C.) 35 F. 866, 1 L.R.A. 744; Whaley v. State, 168 Ala. 152, 52 So. 941, 30 L.R.A.(N.S.) 499; Ex parte Byles, 93 Ark. 612, 126 S. W. 94, 37 L.R.A. (N.S.) 774, writ of error dismissed in 225 U. S. 717, 56 L. ed. 1270, 32 S. Ct. 836; Re Hunter, 97 Colo. 279, 49 P. (2d) 1009, 101 A.L.R. 1202; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Farris v. Vannier, 6 Dak. 186, 42 N. W. 31, 3 L.R.A. 713; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; People v. McBride, 234 Ill. 146, 84 N. E. 865, 14 Ann. Cas. 994, 123 Am. St. Rep. 82; People ex rel. Deneen v. People's Gaslight & Coke Co. 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567; Simrall v. Covington, 90 Ky. 444, 14 S. W. 369, 9 L.R.A. 556, 29 Am. St. Rep. 398; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; State v. Baskowitz, 250 Mo. 82, 156 S. W. 945, Ann. Cas. 1915A, 477; Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572; State ex

that it must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears[8] or is made to appear beyond a reasonable doubt;[9]

Camp Sing, 18 Mont. 128, 44 P. 516, 56 Am. St. Rep. 551; State v. Standard Oil Co. 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449; State v. Tibbets, 52 Neb. 228, 71 N. W. 990, 66 Am. St. Rep. 492; Ex parte Kair, 28 Nev. 127, 425, 80 P. 463, 82 P. 453, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; State, Paul, Prosecutor, v. Judge of Circuit Ct. 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L.R.A. 105; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; State ex rel. Sherman v. George, 22 Or. 142, 29 P. 356, 16 L.R.A. 737, 29 Am. St. Rep. 586; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L.R.A. 351; Tintic Standard Min. Co. v. Utah County, 80 Utah, 491, 15 P. (2d) 633, citing R. C. L.; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 517; Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061; Taxpayers' League v. McPherson, 49 Wyo. 251, 54 P. (2d) 897, 106 A.L.R. 767.

Annotation: 87 Am. St. Rep. 452.

[8] **United States.**—Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92; United States v. Gettysburg Electric R. Co. 160 U. S. 680, 40 L. ed. 576, 16 S. Ct. 427; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Mugler v. Kansas 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Close v. Glenwood Cemetery, 107 U. S. 466, 27 L. ed. 408, 2 S. Ct. 267; United States v. Harris 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; Livingston County v. Darlington, 101 U. S. 407, 25 L. ed. 1015; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Cooper v. Telfair, 4 Dall. 14, 1 L. ed. 721.

Arkansas.—Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493.

California.—Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 469; People v. Hayne, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348, 17 Am. St. Rep. 211.

Colorado.—Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158.

Connecticut.—Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

Illinois.—People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Chicago v. Manhattan Cement Co. 178 Ill. 372, 53 N. E. 68, 45 L.R.A. 848, 69 Am. St. Rep. 321.

Indiana.—State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

Iowa.—State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

Kentucky.—Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219.

Maine.—Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; State v. Snowman, 94 Me. 99, 46 A. 815, 50 L.R.A. 544, 80 Am. St. Rep. 389.

Massachusetts.—Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1; Wright v. Walcott, 238 Mass. 432, 131 N. E. 291, 18 A.L.R. 1242; Davison v. Johonnot, 7 Met. 388, 41 Am. Dec. 448.

Michigan.—Burt v. Munising Woodenware Co. 222 Mich. 699, 193 N. W. 895, citing R. C. L.; Fremont Canning Co. v. Waters, 209 Mich. 178, 176 N. W. 577, citing R. C. L.; People v. Gansley, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E, 165; Rouse, H. & Co. v. Donovan, 104 Mich. 234, 62 N. W. 359, 27 L.R.A. 577, 53 Am. St. Rep. 457; People v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L.R.A. 609.

Minnesota.—State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

Missouri. — State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393; Wells v. Missouri P. R. Co. 110 Mo. 286, 19 S. W. 530, 15 L.R.A. 847; State ex rel. Atty. Gen. v. Simmons Hardware Co. 109 Mo. 118, 18 S. W. 1125, 15 L.R.A. 676.

Montana.—Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294.

Nebraska.—Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.

New York.—People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 67 N. E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674.

North Carolina.—Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247.

North Dakota.—State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State v. Northern P. R. Co. 19

N. D. 45, 120 N. W. 869, 25 L.R.A.(N.S.) 1001.

Oregon.—Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; State v. Standard Oil Co. 61 Or. 438, 123 P. 40, Ann. Cas. 1914B, 179; Ellis v. Frazier, 38 Or. 462, 63 P. 642, 53 L.R.A. 454; Deane v. Willamette Bridge Co. 22 Or. 167, 29 P. 440, 15 L.R.A. 614.

Pennsylvania.—DeWalt v. Bartley, 146 Pa. 529, 24 A. 185, 15 L.R.A. 771, 28 Am. St. Rep. 814.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Re Ten-Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; State v. Narragansett Dist. 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

South Carolina.—Kirk v. Board of Health (Kirk v. Wyman) 83 S. C. 372, 65 S. E. 387, 23 L.R.A.(N.S.) 1188; Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723, overruled on another point in Mauldin v. Greenville, 53 S. C. 285, 31 S. E. 252, 43 L.R.A. 101, 69 Am. St. Rep. 855.

South Dakota.—Re McKennan, 25 S. D. 369, 126 N. W. 611, 27 S. D. 136, 130 N. W. 33, 33 L.R.A.(N.S.) 606, Ann. Cas. 1913D, 745.

Tennessee.—State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L.R.A. 478, 70 Am. St. Rep. 703.

Texas.—Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Utah.—Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552.

Vermont.—State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

Washington.—Re O'Neill, 41 Wash. 174, 83 P. 104, 3 L.R.A.(N.S.) 558, 6 Ann. Cas. 869.

Wisconsin.—Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A.L.R. 465.

Wyoming.—State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

Annotation: 88 Am. St. Rep. 935.

Every reasonable intendment to avoid holding a statute unconstitutional must be indulged in. First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 S. Ct. 734, L.R.A.1918C, 283, Ann. Cas. 1918D, 1169; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 S. Ct. 671; Lewis Pub. Co. v. Morgan, 229 U. S. 288, 57 L. ed. 1190, 33 S. Ct. 867.

The rule that a statute cannot be declared unconstitutional unless it clearly so appears is of peculiar force in its application to the question whether or not a legislative act authorizing a tax is for a public purpose. State ex rel. State Reclamation Bd. v. Clausen, 110 Wash. 525, 188 P. 538, 14 A.L.R. 1133.

[9] **United States.**—Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 109 A.L.R. 1330; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 932, 1257; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Per Washington, J., Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606.

Alabama.—State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; State ex rel. Crenshaw v. Joseph, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914D, 248; State v. Reid, 1 Ala. 612, 34 Am. Dec. 44.

Colorado.—Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; Farmers' Independent Ditch Co. v. Agricultural Ditch Co. 22 Colo. 513, 45 P. 444, 55 Am. St. Rep. 149.

Connecticut.—State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; State v. Bassett, 100 Conn. 430, 123 A. 342, 37 A.L.R. 131; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

Florida.—Anderson v. Ocala, 67 Fla. 204, 64 So. 775, 52 L.R.A.(N.S.) 287; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Munn v. Finger, 66 Fla. 572, 64 So. 271, 51 L.R.A.(N.S.) 631; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; State ex rel. Andreu v. Canfield, 40 Fla. 36, 23 So. 591, 42 L.R.A. 72.

Idaho.—Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

Illinois.—Victor Chemical Works v. Industrial Bd. 274 Ill. 1, 113 N. E. 173, Ann. Cas. 1918B, 627; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893.

Indiana.—Cincinnati, H. & D. R. Co. v. McCullom, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, affirmed in 245 U. S. 632, 62 L. ed. 521, 38 S. Ct. 64; State ex rel. Harrison v. Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L.R.A. 408; Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L.R.A. 337.

Iowa.—State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477.

Kentucky.—Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219.

Maine.—Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397; State v. Snowman, 94 Me. 99, 46 A. 815, 50 L.R.A. 544, 80 Am. St. Rep. 380.

Massachusetts.—Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1; Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Com. v. Slavski, 245 Mass. 405, 140 N. E. 465, 29 A.L.R. 281.

Michigan.—Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

and that it is only where its invalidity is made to appear clearly, plainly,[10]

Minnesota.—Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450.

Mississippi.—State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152, 5 L.R.A. (N.S.) 340.

Missouri.—Alexander v. Chicago, M. & St. P. R. Co. 282 Mo. 236, 221 S. W. 712, 11 A.L.R. 867; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; State v. Buente, 256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915D, 879; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; State v. Layton, 169 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487, writ of error dismissed in 187 U. S. 356, 47 L. ed. 214, 23 S. Ct. 137; State v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393.

Montana. — State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424; State ex rel. Campbell v. Stewart, 54 Mont. 504, 171 P. 755, Ann. Cas. 1918D, 1101; State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210, Ann. Cas. 1916B, 39; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551.

Nebraska.—Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.

North Carolina.—State v. Lawing, 164 N. C. 492, 80 S. E. 69, 51 L.R.A.(N.S.) 62; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562.

North Dakota.—State ex rel. Sathre v. Board of University & S. Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.

Oklahoma.—Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144; State ex rel. Cruce v. Cease, 28 Okla. 271, 114 P. 251, Ann. Cas. 1912D, 151.

Oregon.—Smith v. Cameron, 106 Or. 1, 210 P. 716, 27 A.L.R. 510; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97.

Rhode Island.—State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; State v. Narragansett Dist. 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

South Carolina.—State v. Ailsen, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

South Dakota.—McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E, 858, Ann. Cas. 1917A, 1046; State v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; State v. Delamater, 20 S. D. 23, 104 N. W. 537, 8 L.R.A.(N.S.) 774, 129 Am. St. Rep. 907, affirmed in 205 U. S. 93, 51 L. ed. 724, 27 S. Ct. 447, 10 Ann. Cas. 733; McClain v. Williams, 10 S. D. 332, 73 N. W. 72, 43 L.R.A. 287.

Texas. — Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Vermont.—Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; State v. Clement National Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

Washington. — Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State ex rel. Case v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State v. Ide, 35 Wash. 576, 77 P. 961, 67 L.R.A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634.

West Virginia.—State Road Commission v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Wisconsin.—Van Dyke v. Tax Commission, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040; Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A.L.R. 465; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

Wyoming—Zancanelli v. Central Coal & Coke Co. 25 Wyo. 511, 173 P. 981, citing R. C. L.

Annotation: 48 Am. Dec. 269.

To establish the unconstitutionality of an act of Congress requires a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

A statute which prescribes a rule of purely governmental policy and relates mainly to the conduct and administration of public affairs will not be declared unconstitutional unless repugnant to the organic law beyond a reasonable doubt. Ex parte Ashton, 231 Ala. 497, 165 So. 773, 104 A.L.R. 54.

[10] **United States.**—Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92; Booth v. Illinois, 184

U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 S. Ct. 391; Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Re Garland, 4 Wall. 333, 18 L. ed. 366; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Cooper v. Telfair, 4 Dall. 14, 1 L. ed. 721; Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Lawton v. Comer (D. C.) 40 F. 480, 7 L.R.A. 55; Chicago & N. W. R. Co. v. Dey (C. C.) 35 F. 866, 1 L.R.A. 744.

Arizona.—Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—State v. Moore, 76 Ark. 197, 88 S. W. 881, 70 L.R.A. 671; State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153.

California—Pacific Indem. Co. v. Industrial Acci. Commission, 215 Cal. 461, 11 P. (2d) 1, 82 A.L.R. 1170; Deyoe v. Superior Ct. 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73.

Colorado.—Re Hunter, 97 Colo. 279, 49 P. (2d) 1009, 101 A.L.R. 1202; Consumers League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; Denver v. Knowles, 17 Colo. 204, 30 P. 1041, 17 L.R.A. 135.

Florida.—State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118; Escambia County v. Pilot Comrs. 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196.

Georgia.—Floyd County v. Scoggins, 164 Ga. 485, 139 S. E. 11, 53 A.L.R. 1286.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228.

Illinois.—People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L.R.A. 84; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 70.

Iowa. — Flood v. City Nat. Bank, 218 Iowa, 898, 253 N. W. 509, 95 A.L.R. 1163; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Hunter v. Colfax Consol Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477; Richman v. Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L.R.A. 445, 14 Am. St. Rep. 308.

Kansas.—Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A.(N.S.) 680, Ann. Cas. 1913C, 317.

Kentucky. — Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Gullion v. Bowlware, Sneed, 76, 2 Am. Dec. 708.

Maine.—State v. Pooler, 105 Me. 224, 74 A. 119, 24 L.R.A.(N.S.) 408, 134 Am. St. Rep. 543; State v. Butler, 105 Me. 91, 75 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; Ulmer v. Lime Rock R. Co. 98 Me. 579, 57 A. 1001, 66 L.R.A. 387.

Maryland.—Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine, Acci. & P. G. Ins. Co. 111 Md. 561, 75 A. 105, 134 Am. St. Rep. 636; Cochran v. Preston, 108 Md. 220, 70 A. 113, 23 L.R.A.(N.S.) 1153, 129 Am. St. Rep. 432, 15 Ann. Cas. 1045; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; State use of Washington County v. Baltimore & O. R. Co. 12 Gill & J. 399, 38 Am. Dec. 319, affirmed in 3 How. (U. S.) 534, 11 L. ed. 714.

Massachusetts. — Foster v. Essex Bank, 16 Mass. 244, 8 Am. Dec. 135.

Michigan. — Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 350, 12 A.L.R. 26; Detroit v. Board of Assessors (Detroit v. Rentz) 91 Mich. 78, 51 N. W. 787, 16 L.R.A. 59.

Minnesota.—State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707.

Mississippi.—University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437.

Missouri.—State ex rel. Atlantic Horse Ins. Co. v. Blake, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913C, 1283; Wiles v. Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A. (N.S.) 1060; O'Connor v. St. Louis Transit Co. 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L.R.A. 622; Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369.

Montana.—State ex rel. Powell v. State Bank, 90 Mont. 539, 4 P. (2d) 717, 80 A.L.R. 1494; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572.

Nebraska. — Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922.

Nevada. — Nash v. McNamara, 30 Nev. 114, 93 P. 405, 16 L.R.A.(N.S.) 168, 133 Am. St. Rep. 694; Ex parte Kair, 28 Nev. 127, 80 P. 463, 82 P. 453, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66.

New Hampshire.—State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A.1916A, 950; Simpson v. City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491.

palpably,[11] and by irrefragable evidence,[12] where the case is so clear as to be

New Jersey.—State v. Dolbow, 117 N. J. L. 560, 189 A. 915, 109 A.L.R. 1488.

New York.—Johnson v. New York, 274 N. Y. 411, 9 N. E. (2d) 30, 110 A.L.R. 1502; Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579.

North Carolina.—State v. Lawing, 164 N. C. 492, 80 S. E. 69, 51 L.R.A.(N.S.) 62; State v. Hay, 126 N. C. 999, 35 S. E. 459, 49 L.R.A. 588, 78 Am. St. Rep. 691.

North Dakota—State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; State v. Ligaarden, 59 N. D. 475, 230 N. W. 729, 70 A.L.R. 126; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897.

Ohio.—L. & M. Invest. Co. v. Cutler, 125 Ohio St. 12, 180 N. E. 379, 86 A.L.R. 707; Longbrake v. State, 112 Ohio St. 13, 146 N. E. 417, 41 A.L.R. 925; State ex rel. Weinberger v. Miller, 87 Ohio St. 12, 99 N. E. 1078, 44 L.R.A.(N.S.) 712, Ann. Cas. 1913E, 761.

Oklahoma. — Mangum v. Todd, 42 Okla. 343, 141 P. 966, L.R.A.1915A, 382; Stout v. State, 36 Okla. 744, 130 P. 553, 45 L.R.A. (N.S.) 884, Ann. Cas. 1916E, 858; Re Sadler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.

Oregon.—Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165, affirmed in 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430; State v. Jacobsen, 80 Or. 648, 157 P. 1108, L.R.A.1916E, 1180; Simon v. Northup, 27 Or. 487, 40 P. 560, 30 L.R.A. 171.

Pennsylvania.—Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1100, Ann. Cas. 1915C, 498; Shambless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

Rhode Island. — State v. Narragansett Dist. 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

South Dakota—State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A. (N.S.) 804; Bon Homme County v. Berndt, 13 S. D. 309, 83 N. W. 333, 50 L.R.A. 351; McClain v. Williams, 10 S. D. 332, 73 N. W. 72, 43 L.R.A. 287.

Tennessee.—Tate v. Bell, 4 Yerg. 202, 26 Am. Dec. 221.

Texas.—St. Louis S. W. R. Co. v. Grimes, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; State ex rel. Guerguin v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L.R.A. 593; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 796.

Utah.—Keetch v. Cordner, — Utah, —, 62 P. (2d) 273, 108 A.L.R. 52; Tintic Standard Min. Co. v. Utah County, 80 Utah, 491, 15 P. (2d) 622, citing R. C. L.; State v. Candland, 36 Utah, 406, 104 P. 295, 24 L.R.A. (N.S.) 1260, 140 Am. St. Rep. 834; State v. Sopher, 25 Utah, 318, 71 P. 482, 60 L.R.A. 468, 95 Am. St. Rep. 845.

Washington.—State ex rel. State Reclamation Bd. v. Clausen (State ex rel. Chase v. Clausen) 110 Wash. 525, 188 P. 538, 14 A.L.R. 1133; Mallette v. Spokane, 77 Wash. 205, 137 P. 495, 51 L.R.A.(N.S.) 636, Ann. Cas. 1915D, 225; State v. Tausick, 64 Wash. 69, 116 P. 651, 35 L.R.A.(N.S.) 802.

West Virginia—Cunningham v. Cokely, 79 W. Va. 60, 90 S. E. 546, L.R.A.1917B, 718; Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272; Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436, 15 L.R.A. 226, 32 Am. St. Rep. 831; State v. Richards, 32 W. Va. 348, 9 S. E. 245, 3 L.R.A. 705.

Wyoming—State ex rel. Voiles v. Johnson County High School, 43 Wyo. 494, 5 P. (2d) 255, citing R. C. L.; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

Annotation: 36 Am. St. Rep. 321.

The rules requiring courts to proceed with caution in considering the constitutionality of a statute and not to declare it unconstitutional unless it is plainly so are founded on the best of reasons, because, while the supreme judicial power may interfere to prevent the legislative and other departments from exceeding their powers, no tribunal has yet been devised to check the encroachments of the judicial power itself. Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247.

Only in cases of plain abuse will the court declare a statute to be violative of a constitutional provision prohibiting the passage of a special law for any case for which provision has been made by an existing general law. Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431.

While a court should hesitate to declare a law unconstitutional, as it should to render any decision involving important consequences, without careful consideration, yet it should not be led away from assuming such responsibility by phrases, clauses, or by the accumulation of the adverbs "clearly," "plainly," "palpably," "unmistakably," and "undoubtedly," found in many able opinions, but which add no force to the plain statement that a court must be clearly satisfied that a law, aided by all presumptions, is unconstitutional before it can declare it to be so. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

The facts adduced to show the alleged unconstitutionality of an apportionment act must be clear and convincing and must establish beyond question that the legislature, in enacting the law, went entirely beyond the limits marked by the Constitution. Annotation: 2 A.L.R. 1343.

11 Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 59; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Floyd County v. Scoggins, 164 Ga. 485, 139 S. E. 11, 53 A.L.R. 1286; Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 796, 20 A.L.R. 1105; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W.

free from doubt[13] or the act is manifestly in contravention of the Constitution,[14] and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt that the courts will declare it unconstitutional.[15] Every rational[16] and reasonable presumption must first be indulged in favor of the validity of the act.[17]

The opinion has been expressed that the conviction required to overcome the presumption in favor of a statute must be clear and strong[18] and that a

364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188; Smith v. Cameron, 106 Or. 1, 210 P. 716, 27 A.L.R. 510; Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; Malette v. Spokane, 77 Wash. 205, 137 P. 496, 51 L.R.A.(N.S.) 686, Ann. Cas. 1915D, 225.

Annotation: 36 Am. St. Rep. 321.

[12] Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A.L.R. 1222; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

[13] Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Nashville v. Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403; Moore v. Texas & N. O. R. Co. (C. C. A. 5th) 75 F. (2d) 386 (writ of certiorari dismissed in 297 U. S. 101, 80 L. ed. 509, 56 S. Ct. 372), citing R. C. L.; State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; Atchison, T. & S. F. R. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; Flood v. City Nat. Bank, 218 Iowa, 898, 253 N. E. 509, 95 A.L.R. 1168; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397; State v. Rogers, 95 Me. 94, 49 A. 564, 85 Am. St. Rep. 395; Hanna v. Young, 84 Md. 179, 35 A. 674, 34 L.R.A. 55, 57 Am. St. Rep. 396; Harrison v. State, 22 Md. 68, 85 Am. Dec. 658; State v. Baltimore & O. R. Co. 12 Gill & J. (Md.) 399, 38 Am. Dec. 317; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437; Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L.R.A. 815; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; Lynn v. Nichols, 122 Misc. 170, 202 N. Y. S. 401 (affirmed in 210 App. Div. 812, 205 N. Y. S. 935), citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A. (N.S.) 290, 14 Ann. Cas. 562; Key v. Ardmore, 30 Okla. Crim. Rep. 8, 234 P. 793, citing R. C. L.; Smith v. Cameron, 106 Or. 1, 210 P. 716, 27 A.L.R. 510; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238), citing R. C. L.; Wingfield v. South Carolina Tax Commission, 147 S. C. 116, 144 S. E. 846, citing R. C. L.; Brimm v. Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Re Millecke, 52 Wash. 312, 100 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

[14] Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 S. Ct. 148; United States v. Hall (C. C.) 44 F. 883, 10 L.R.A. 323; Dell v. Marvin, 41 Fla. 221, 26 So. 188, 45 L.R.A. 201, 79 Am. St. Rep. 171; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L.R.A. 84; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; Callen v. Junction City, 43 Kan. 627, 23 P. 652, 7 L.R.A. 736; Ulmer v. Lime Rock R. Co. 98 Me. 579, 57 A. 1001, 66 L.R.A. 387; Hanna v. Young, 84 Md. 179, 35 A. 674, 34 L.R.A. 55, 57 Am. St. Rep. 396; People v. Morris, 80 Mich. 634, 45 N. W. 591, 8 L.R.A. 685; State ex rel. Corcoran v. Chapel, 64 Minn. 130, 66 N. W. 205, 32 L.R.A. 131, 58 Am. St. Rep. 524; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; State v. Hope, 100 Mo. 347, 13 S. W. 490, 8 L.R.A. 608; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; High School Dist. v. Lancaster County, 60 Neb. 147, 82 N. W. 380, 49 L.R.A. 343, 83 Am. St. Rep. 525; Bott v. Wurts, 63 N. J. L. 289, 43 A. 744, 881, 45 L.R.A. 251; People ex rel. Carter v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L.R.A. 836; Cleveland, C. C. & St. L. R. Co. v. Wells, 65 Ohio St. 313, 62 N. E. 332, 58 L.R.A. 651; State ex rel. Richards v. Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L.R.A. 737; Russ v. Com. 210 Pa. 544, 60 A. 169, 1 L.R.A.(N.S.) 409, 105 Am. St. Rep. 825; Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145; Ex parte Mode, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918E, 845; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Thurston County v. Tenino Stone Quaries, 44 Wash. 351, 87 P. 634, 9 L.R.A.(N.S.) 306, 12 Ann. Cas. 314.

[15] El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 S. Ct. 21; Butler v. Pennsylvania, 10 How. (U. S.) 402, 13 L. ed. 472; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; State ex rel. Welsh v. Darling, 216 Iowa, 553, 246 N. W. 390, 88 A.L.R. 218; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Cochran v. Preston, 107 Md. 220, 70 A. 113, 23 L.R.A.(N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; Pawlowski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; Re Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 359, 12 A.L.R. 26; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424; Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815, 109 A.L.R. 1229; State v. Weddington, 188 N. C. 643, 125 S. E. 257, 37 A.L.R. 573; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A. (N.S.) 299, 14 Ann. Cas. 562; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L.R.A. (N.S.) 997; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; State v. First State Bank, 52 N. D. 231, 202 N. W. 391, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; U'ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998; Ulbden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State v. Superior Ct. 69 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925; State v. Ide, 35 Wash. 576, 77 P. 961, 67 L.R.A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634; State Road Commission v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; Van Dyke v. Tax Commission, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332.

To warrant a court in pronouncing legislation unconstitutional, it must indubitably infringe some constitutional right. Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A.(N.S.) 40, Ann. Cas. 1915B, 812; State v. Lawing, 164 N. C. 492, 80 N. E. 69, 51 L.R.A.(N.S.) 62.

In the absence of convincing proof of unconstitutional discrimination, the presumption in favor of the constitutionality of a statute must prevail. Johnson v. Gentry, 220 Cal. 231, 30 P. (2d) 400, 92 A.L.R. 1264.

[16] Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1; Com. v. Slavski, 245 Mass. 405, 140 N. E. 465, 29 A.L.R. 281.

[17] Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788; Ex parte Ashton, 231 Ala. 497, 165 So. 773, 104 A.L.R. 54; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Keiningham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487; Lewis & Clark County v. Industrial Acci. Bd. 52 Mont. 6, 155 P. 268, L.R.A.1916D, 628; State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827; State ex rel. Sathre v. Board of University & School Lands, 65 N. D. 687, 262 N. W. 60, citing R. C. L.; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; State v. Van Vlack, 101 Wash. 503, 172 P. 563, L.R.A.1918E, 108.

[18] Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606 (per Trimble, J.); Friesleben v. Shallcross, 9 Houst. (Del.) 1, 19 A. 576, 8 L.R.A. 337; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Fames v. Savage, 76 Me. 212, 52 Am. Rep. 751; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; Brimm v. Jones, 11 Utah, 200, 39 P. 825, 29 L.R.A. 97, affirmed in 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; State

law should never be lightly overthrown or set aside as unconstitutional.[19] The validity of a law ought not to be questioned unless it is so obviously repugnant to the Constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy.[20]

It should be noted that these general principles and presumptions do not have universal application. It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by the clear and explicit constitutional provision, this presumption in favor of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute.[1] Moreover, where a court passes on the constitutionality of a statute, in the validity of which it has a direct pecuniary interest, such a court should refuse to uphold the act, unless it is clear by reason and authority that the law is constitutional.[2]

The very nature of the exceptions to the general rule shows that in a great majority of the cases involving the validity of legislation, the presumption of constitutionality may be applied, but, as the Supreme Court has pointed out, it is a rebuttable presumption of fact[3] and is not conclusive.[4] The terms of the law itself may patently forbid the employment of the presumption. Thus, the presumption that a law regularly passed by Congress is valid cannot prevail where the contrary is found on the very face of its provision.[5]

§ 129. Proceedings of Legislature.—The basis of the fundamental principle as to the existence of a presumption in favor of the legality of legislation has been placed on various grounds. The most important of these is the doctrine which forbids one branch of the state government to encroach on the duties and powers of another.[6] For the purposes of sustaining the presumption in favor of the constitutionality of a statute, the courts have elaborated on the respect with which they regard the action of the other two departments of government. Accordingly, it has been said that the responsibility of upholding the Constitution does not rest on the courts alone, but that the legislature is the ultimate guardian of the liberties and welfare of the people,[7] that its

ex rel. Case v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

Courts should seldom, if ever, declare a law to be void for its repugnance to the Constitution in a doubtful case, but the opposition between the Constitution and the law should be such that the court feels a clear and strong conviction of their incompatibility with each other. Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

Proof of a statute's invalidity by reason of its conflict with the Constitution must be highly persuasive. Eastern & W. Lumber Co. v. Patterson, 124 Or. 146, 264 P. 441, 60 A.L.R. 528, affirmed in 278 U. S. 581, 73 L. ed. 518, 49 S. Ct. 184.

A court must be clearly satisfied that a law aided by all presumptions is unconstitutional before it can declare it to be so. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

[19] Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; State v. Hegreiver, 152 Ind. 652, 53 N. E. 921, 45 L.R.A. 504; Wilson v. Fargo, 48 N. D. 447, 186 N. W. 263, citing R. C. L.; Re Ten Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; Tintic Standard Min. Co. v. Utah County, 80 Utah, 491, 15 P. (2d) 633, citing R. C. L.

[20] State ex rel. George v. Aiken, 42 S. C. 222, 20 N. E. 221, 26 L.R.A. 345.

[1] Salter v. State, 2 Okla. Crim. Rep. 461, 102 P. 719, 25 L.R.A.(N.S.) 60, 139 Am. St. Rep. 935.

[2] McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E, 858, Ann. Cas. 1917A, 1046.

[3] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187.

[4] New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A.1917E, 761, Ann. Cas. 1918B, 1032; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

[5] Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 66 L. ed. 817, 42 S. Ct. 449, 21 A.L.R. 1432.

[6] Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188.

As to the doctrine of separation of powers, see infra, §§ 180 et seq.

[7] Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 S. Ct. 638; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540.

"The courts are reluctant and averse to declare an act of a co-ordinate department of the government an unwarranted assumption of judicial power, and will not do so, except where the character of the act done is in plain and obvious conflict with the Constitution." Harris v. Allegany County, 130 Md. 488, 100 A. 733, L.R.A. 1917E, 824.

[8] State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955 (concurring opinion); Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; Duncan v. Baltimore & O. R. Co. 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912B, 272.

It is the duty of one department to presume that another has acted within its legitimate province, until the contrary is made to appear by strong and convincing reasons. Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734.

[9] Williams v. Jacksonville, 118 Fla. 671, 160 So. 15, 98 A.L.R. 513; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A. (N.S.) 188; Elk River Coal & Lumber Co. v. Funk, — Iowa, —, 271 N. W. 204, 110 A.L.R. 1415; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A. (N.S.) 821; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; Boyer-Campbell Co. v. Fry, 271 Mich. 282, 260 N. W. 165, 98 A.L.R. 827; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State ex rel. McCaffery v. Aloe, 152 Mo. 466, 54 S. W. 494, 47 L.R.A. 393; State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

Every statute is presumed to have been enacted in accordance with the constitutional requirements, until the contrary is made to appear. Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

"The court is bound to assume that in the passage of any law, the legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly, and discriminatingly decided that they were acting within their constitutional limits and powers." Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734.

Legislatures must be presumed to act from public considerations and when their measures relate to matters of general interest and can be vindicated under express or justly implied powers, and especially when intended for improvements or salutary reforms in abuses, the disposition of the judiciary should be strong to uphold them. Planters' Bank v. Sharp, 6 How. (U. S.) 301, 12 L. ed. 447.

[10] Becker Steel Co. v. Cummings, 296 U. S. 74, 80 L. ed. 54, 56 S. Ct. 15; Miller v. United States (Page v. United States) 11 Wall. (U. S.) 268, 20 L. ed. 135; Bank of United States v. Halstead, 10 Wheat. (U. S.) 51, 6 L. ed. 264; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Com. v. Snow, 269 Mass. 598, 169 N. E. 542, 68 A.L.R. 920; Nebraska Dist. v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A.L.R. 1688; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; State v. Peel Splint Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774 (recognizing principle).

[11] United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

[12] Becker Steel Co. v. Cummings, 296 U. S. 74, 80 L. ed. 54, 56 S. Ct. 15.

members and the governor are required to take an oath to support the Constitution, both Federal and state, and that the presumption is that they have obeyed this oath,[8] have been careful to observe the requirements of the Constitution in enacting statutes,[9] and have intended no violation of the Constitution.[10] Therefore, every presumption is to be indulged in favor of faithful compliance by Congress with the mandate of the Constitution,[11] and in determining the nature of a remedy given by an act of Congress, it must be presumed that Congress intended that it be constitutionally sufficient.[12]

A statute enacted with the constitutional formalities comes before the courts sustained and authenticated by the sanction and approval of two of the three great departments of the state government; hence the presumption

in its favor.[13] Unless a statute is clearly unconstitutional, the courts, in determining its validity, may not ignore the concurrence of opinion of validity by Congress and the legislatures of the various states.[14]

A presumption producing an effect opposite to that herein announced—namely, that a legislative body is presumed to exceed its authority or is presumed to have intended a violation of the Constitution—is never indulged by the courts.[15]

§ 130. Duty of Courts to Uphold Statutes.—By reason of the presumption in favor of the constitutionality of acts of the legislature, it is the general duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power[16] if it is possible to do so without disregarding the plain com-

[13] Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L.R.A. 504; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A. (N.S.) 188; State v. Superior Ct. 60 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925.

A school code which is the product of the deliberate thought of a commission of prominent citizens who worked upon it for several years, and has been passed by two legislatures after prolonged consideration before final approval by the governor, will not be set aside as unconstitutional unless the branches of the fundamental law are so glaring that there is no escape. Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E, 1324.

[14] People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85.

[15] East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. (U. S.) 373, 20 L. ed. 611; United States v. Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004.

The court cannot assume that the legislature intended to enact a law of doubtful constitutionality and must, if it is reasonably possible to do so, construe the words used so as to make the statute a valid and reasonable one. Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897.

As to presumptions concerning the motives of the legislature generally, see infra, § 140.

[16] **United States.** — Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Dane v. Jackson, 256 U. S. 589, 65 L. ed. 1107, 41 S. Ct. 566; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 S. Ct. 21; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 S. Ct. 611; Austin v. United States, 155 U. S. 417, 39 L. ed. 206, 15 S. Ct. 167; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 S. Ct. 1038; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Grenada County v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 S. Ct. 125; Callaway County v. Foster, 93 U. S. 567, 23 L. ed. 911; Sewing Mach. Co's Case, 18 Wall. 553, 21 L. ed. 914; Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426; Murray v. Gibson, 15 How. 421, 14 L. ed. 755.

Alabama. — Jefferson County v. Busby, 226 Ala. 293, 148 So. 411, citing R. C. L.; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98.

Arizona.—Laird v. Sims, 16 Ariz. 521, 147 P. 738, L.R.A.1915F, 519; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Western U. Teleg. Co. v. State, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82; State v. Moore, 76 Ark. 197, 88 S. W. 881, 70 L.R.A. 671; State v. Lancashire F. Ins. Co. 66 Ark. 466, 51 S. W. 633, 45 L.R.A. 348.

California.—Macmillan Co. v. Clark, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577.

Connecticut.—Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897; Blakeslee v. Hartford, 106 Conn. 642, 139 A. 106, 55 A.L.R. 1319; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124.

Delaware. — Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

Florida.—State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Dell v. Marvin, 41 Fla. 221, 26 So. 188, 45 L.R.A. 201, 79 Am. St. Rep. 171.

Georgia.—Georgia F. Ins. Co. v. Cedartown, 134 Ga. 87, 67 S. E. 410, 19 Ann. Cas. 954; Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379.

Idaho.—Smallwood v. Jeter, 42 Idaho, 169, 244 P. 149, citing R. C. L.

Illinois.—Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607; Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175.

Indiana.—Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480, 36 S. Ct. 445; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340, Ann. Cas. 1914D, 1284; State v. Lowry, 166 Ind. 372, 77 N. E. 728, 4 L.R.A.(N.S.) 528, 9 Ann. Cas. 350; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313.

Iowa.—Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372, 104 Am. St. Rep. 283, affirmed in 196 U. S. 261, 49 L. ed. 471, 25 S. Ct. 233;

mand or necessary implication of the fundamental law.[17] The primary duty of the courts is to construe statutes with reference to the Constitution, and only when that is clearly violated by a provision of a statute may the courts declare such a provision unconstitutional.[18] It has been said that the courts should not conjure up theories to overturn and overthrow the solemn declarations of the legislative body.[19] On the other hand, it is also the duty of

State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; Stewart v. Polk County, 30 Iowa, 9, 1 Am. Rep. 238; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

Massachusetts. — Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1.

Michigan.—Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

Minnesota. — Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State ex rel. Utick v. Polk County, 87 Minn. 325, 92 N. W. 216, 60 L.R.A. 161.

Missouri. — Neil v. Independent Realty Co. 317 Mo. 1235, 298 S. W. 363, 70 A.L.R. 550; Kusnetzky v. Security Ins. Co. 313 Mo. 143, 281 S. W. 47, 45 A.L.R. 189; Alexander v. Chicago, M. & St. P. R. Co. 282 Mo. 236, 221 S. W. 712, 11 A.L.R. 867; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601; Greene County v. Lvdv, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148.

Montana.—State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020; Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424.

Nebraska.—Dinuzzo v. State, 85 Neb. 351, 123 N. W. 309, 29 L.R.A.(N.S.) 417; State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671; State v. Standard Oil Co. 61 Neb. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

New Hampshire.—Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090; Leavitt v. Lovering, 64 N. H. 607, 15 A. 414, 1 L.R.A. 58.

New York.—Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054; Bloodgood v. Mohawk & H. R. Co. 18 Wend. 9, 31 Am. Dec. 313.

North Carolina.—State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; State v. Weddington, 188 N. C. 643, 125 S. E. 257, 37 A.L.R. 573.

North Dakota.—Wood v. Byrne, 60 N. D. 1, 232 N. W. 303, citing R. C. L.; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897.

Oklahoma.—Lahoma Oil Co. v. State Industrial Commission, 71 Okla. 160, 175 P. 836, 15 A.L.R. 817, overruled on other grounds in Western Indem. Co. v. State Industrial Commission, 96 Okla. 100, 219 P. 147, 29 A.L.R. 1419; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008; Salter v. State, 2 Okla. Crim. Rep. 464, 102 P. 719, 25 L.R.A.(N.S.) 60, 139 Am. St. Rep. 935.

Oregon.—Eastern & W. Lumber Co. v. Patterson, 124 Or. 146, 264 P. 441, 60 A.L.R. 528, affirmed in 278 U. S. 581, 71 L. ed. 518, 49 S. Ct. 184.

Pennsylvania.—Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460.

South Dakota.—Payne v. Jones, 47 S. D. 488, 199 N. W. 472, citing R. C. L.; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66.

Tennessee.—Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015.

Texas. — Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

Utah.—Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31; Re Barre Water Co. 62 Vt. 27, 20 A. 109, 9 L.R.A. 195.

Washington.—State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209.

West Virginia.—Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L.R.A.1915F, 1093; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin.—Van Dyke v. Tax Commission, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332; Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.

Wyoming.—State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

As to the very similar duty of the court to adopt a construction of a statute which will render it constitutional where it is possible to do so, and, further, so to construe statutes as to avoid a doubt of constitutionality where possible, see supra, § 97.

[17] Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607; New York C. & H. R. R. Co. v. Williams, 199 N. Y. 108, 92 N. E. 404, 35 L.R.A.(N.S.) 549, 139 Am. St. Rep. 850; Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460.

[18] Escambia County v. Pilot Comrs. 52 Fla. 197, 42 So. 697, 120 Am. St. Rep. 196; Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State v. Weddington, 188 N. C. 643, 125 S. E. 257, 37 A.L.R. 573; State ex rel. Sathre v. Hopton, 66 N. D. 313, 265 N. W. 395, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 154, L.R.A.1917B, 710; Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460; Van Dyke v. Wisconsin Tax Commission, 217 Wis. 528, 259 N. W. 700, 98 A.L.R. 1332.

[19] Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, citing R. C. L.; State v. Superior Ct. 60 Wash. 370, 111 P. 233, 140 Am. St. Rep. 925; State ex rel. Voiles v. John-

the judiciary, when required in the regular course of judicial proceedings, to declare void any act which is in violation of the Constitution of the United States or of a state.[20]

§ 131. Facts.—If an act of the legislature would be valid only in the event certain circumstances exist, it will be presumed that all such circumstances do exist.[1] For example, where the classification in a police regulation is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of the state of facts at the time the law was enacted must be assumed.[2] Similarly, the existence of a state of facts necessary to warrant a distinction in legislation may be presumed,[3] for there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.[4]

The same rule that applies to statutes passed by the legislature is equally applicable to regulations set forth by an administrative body. It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise.[5] The presumption of the existence of facts sufficient to justify an exertion of the police power is strengthened where a regulation is adopted after notice and public hearing.[6]

If it is essential that the legislature have evidence of particular facts in order properly to pass a statute, it is presumed that such evidence is actually

son County High School, 43 Wyo. 494, 5 P. (2d) 255, citing R. C. L.

20 See supra, § 88.

1 Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Re Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; State v. Northern P. R. Co. 19 N. D. 45, 120 N. W. 869, 25 L.R.A.(N.S.) 1001; State ex rel. Short v. Johnson, 90 Okla. 21, 215 P. 945, citing R. C. L.; Payne v. Jones, 47 S. D. 488, 199 N. W. 472, citing R. C. L.; Corsicana Cotton Mills v. Sheppard, 123 Tex. 352, 71 S. W. (2d) 247, citing R. C. L.; State ex rel. Cass v. Howell, 85 Wash. 294, 147 P. 1159, Ann. Cas. 1916A, 1231; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Carnation Milk Products Co. v. Emery, 178 Wis. 147, 189 N. W. 564, citing R. C. L.

If under any possible state of facts a statute would be constitutional, "the existence of that state of facts at the time the law was enacted must be assumed." Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421 Ann. Cas. 1917B, 455.

Ordinarily, it must be plain that no circumstances could justify an act before the courts can declare it invalid. Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458.

2 Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

"In determining the advisability or necessity of a proposed police measure, the legislative body is presumed to take into consideration the circumstances and conditions under which the thing to be regulated or forbidden exists or may occur." Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804.

For a detailed discussion of this doctrine in police power cases, wherein the broad principle hereinabove announced has been occasionally criticized, see infra, § 306.

3 Wampler v. Lecompte, 282 U. S. 172, 75 L. ed. 276, 51 S. Ct. 92.

4 Ward & Gow v. Krinsky, 259 U. S. 503, 66 L. ed. 1033, 42 S. Ct. 529; Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227.

5 Thompson v. Consolidated Gas Utilities Corp. 300 U. S. 55, 81 L. ed. 510, 57 S. Ct. 364; Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853.

The presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches to orders of an administrative body as well as to statutes and municipal ordinances. Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853.

6 Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853.

and properly before the legislative body[7] and that it acted on a full knowledge of the facts.[8]

The fact that the consent of persons who will be affected by the passage of a law has been obtained, previous to its passage, may be presumed, if the law will only be valid in the event such consent has been obtained.[9]

The general presumption is by no means conclusive and therefore it cannot prevail to uphold a statute when the court, having before it all the facts on which the statute might be supported, finds that there is no ground on which it can be supported which will meet the requirements of the Constitution.[10]

§ 132. Burden of Proof.—In consequence of the general presumption in favor of the validity of acts of the legislature and the desires of the courts in resolving all doubts in favor of their validity, the rule has become established that courts will not search the Constitution for express sanction or for reasonable implication to sustain a legislative enactment; the successful assailant must be able to point out the particular provision that has been violated and the ground on which it has been infringed.[11] Where an action is

7 Thibault v. McHaney, 119 Ark. 188, 177 S. W. 8 7, citing R. C. L. (on rehearing); Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 75 A. 105, 134 Am. St. Rep. 636; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

8 Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Thibault v. McHaney, 119 Ark. 188, 177 S. W. 877, citing R. C. L. (on rehearing); Jay Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N. W. 383, 26 A.L.R. 24, reversed on another point in 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; Re Ten Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612.

It is a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole. Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609.

The legislature is presumed to act with full knowledge of all facts essential to valid legislation when it adopts a regulation in the exercise of police power. Jay Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N. W. 383, 26 A.L.R. 24, reversed on another point in 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661.

Legislatures, being chosen by the people, are presumed to understand and correctly appreciate their needs and change the laws accordingly. Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553.

9 Re Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631.

10 Lawton v. Stewart Dry Goods Co. 197 Ky. 394, 247 S. W. 14, 26 A.L.R. 686 (prohibiting trading stamps).

11 Middleton v. Texas Power & Light Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Pine Grove Twp. v. Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227; Re Madera Irrig. Dist. 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106; State ex rel. Johnson v. Goodgame, 91 Fla. 871, 108 So. 836, 47 A.L.R. 118; Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482; Jacksonville v. Bowden, 67 Fla. 131, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; Campbell v. Jackman Bros. 140 Iowa, 475, 118 N. W. 755, 27 L.R.A.(N.S.) 288; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; State ex rel. Witter v. Forkner, 94 Iowa, 1, 62 N. W. 772, 28 L.R.A. 206; Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; Opinion of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332; State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437; Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918E, 574; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; State v. Ligaarden, 59 N. D. 475, 230 N. W. 729, 70 A.L.R. 126; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Vallely v. Park Comrs. 16 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723; Henley v. State, 98

brought for a declaratory judgment as to the constitutionality of a statute, the complainant must point out and state with particularity the details of supposed invalidity.[12] It seems, however, that this broad statement of principles may perhaps be qualified in some jurisdictions, since statutes may be held to be unconstitutional as being in excess of legislative authority. Accordingly, it would seem that it does not follow in every case that the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded or some express command which has been disobeyed.[13]

With regard to the duties cast upon the assailant of a legislative enactment, the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim[14] and must over-

Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L.R.A. 725, overruled on another point in Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469, 5 Ann. Cas. 881, 3 L.R.A.(N.S.) 837; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Ex parte Allison, 48 Tex. Crim. Rep. 634, 90 S. W. 492, 3 L.R.A. (N.S.) 662, 13 Ann. Cas. 684; Henrico County v. Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001; State ex rel. Thompson v. McAllister, 38 W. Va. 485, 18 S. E. 770, 24 L.R.A. 343.

[12] Corn v. Fort, 170 Tenn. 377, 95 S. W. (2d) 620, 106 A.L.R. 647.

[13] State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65.

As to invalidating legislative acts on the theory that they violate implied limitations in the Constitution, see infra, §§ 135, 194.

[14] Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538, rehearing denied in 295 U. S. 767, 79 L. ed. 1708, 55 S. Ct. 647; Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, 77 L. ed. 314, 53 S. Ct. 137; Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831; Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; Bain Peanut Co. v. Pinson, 282 U. S. 499, 75 L. ed. 482, 51 S. Ct. 228; New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397; Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320; Middleton v. Texas Power & Light Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932; 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 S. Ct. 336; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678; Frazier v. State Tax Commission, — Ala. —, 175 So. 402, 110 A.L.R. 1479; Ex parte Ashton, 231 Ala. 497, 165 So. 773, 104 A.L.R. 54; Randle v. Winona Coal Co. 206 Ala. 254, 89 So. 790, 19 A.L.R. 118; Standard Chemical & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, L.R.A.1918C, 522; Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A.1915D, 98; State ex rel. Kimberlite Diamond Min. & Washing Co. v. Hodges, 114 Ark. 155, 169 S. W. 942, L.R.A.1916F, 122; Amos v. Mosley, 74 Fla. 555, 77 So. 619, L.R.A.1918C, 482; State ex rel. Railroad Comrs. v. Florida East Coast R. Co. 69 Fla. 491, 68 So. 761, L.R.A.1918A, 158; Kocsis v. Chicago Park Dist. 362 Ill. 24, 198 N. E. 847, 103 A.L.R. 141; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; State ex rel. Harrison v. Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L.R.A. 408; Cook v. Fogarty, 103 Iowa, 500, 72 N. W. 677, 39 L.R.A. 488; State v. Fourcade, 45 La. Ann. 717, 13 So. 187, 40 Am. St. Rep. 249; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 531, 74 A.L.R. 1189; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Jay Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N. W. 383, 26 A.L.R. 24, reversed on another point in 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, 24 L.R.A. (N.S.) 1104; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; Norman v. Baltimore & O. R. Co. 265 N. Y. 37, 191 N. E. 726, 92 A.L.R. 1523, affirmed in 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352; People ex rel. Henderson v. Westchester County, 147 N. Y. 1, 41 N. E. 563, 30 L.R.A. 74; State ex rel. Maxwell v. Kent-Coffey Mfg. Co. 204 N. C. 365, 168 S. E. 397, 90 A.L.R. 476, affirmed in 291 U. S. 642, 78 L. ed. 1040, 54 S. Ct. 437; Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; State v. Ligaarden, 59 N. D. 475, 230 N. W. 729, 70 A.L.R. 126; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 66 A.L.R. 1553; Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723, overruled on another point in Mauldin v. Greenville, 53 S. C. 285, 31 S. E. 252, 43 L.R.A. 101, 69 Am. St. Rep. 855; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A. 1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; State v. Morse, 84 Vt. 387, 80 A. 189, 34

come the strong presumption in favor of its validity.[15] It has been said that the party who wishes to pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt,[16] and that a party who asserts that the legislature has usurped power or has violated the Constitution must affirmatively and clearly establish his position.[17] Consequently, those who affirm the unconstitutionality of an act of Congress must clearly show that the act is in violation of the provisions of the Constitution; it is insufficient merely to raise a doubt or show that the legislation is unwise.[18]

§ 133. Application to Legislative Acts.—The general principles as to the

L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676.

Annotation: 53 Am. Dec. 581.

The burden rests upon one assailing the validity of a state statute to establish that it infringes the constitutional guaranty which he invokes. Toombs v. Citizens Bank, 281 U. S. 643, 74 L. ed. 1088, 50 S. Ct. 434.

One claiming that a state tax operates as a discrimination against transactions in interstate commerce has the burden of showing the fact. Greenville v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831.

The burden of establishing the unconstitutionality of a state Workmen's Compensation Act as applied to interstate carriers, because of the difficulty or impossibility of making the allocation for insurance premiums to the time of employment in intrastate commerce provided for in such act, is upon the carrier attacking its validity. Boston & M. R. Co. v. Armburg, 285 U. S. 234, 76 L. ed. 729, 52 S. Ct. 336.

A carrier doing an interstate and intrastate business has the burden of showing that the enforcement of a statute requiring a license to do intrastate business operates to prejudice interstate business. Interstate Busses Corp. v. Holyoke Street R. Co. 273 U. S. 45, 71 L. ed. 530, 47 S. Ct. 298.

Where the alleged infringement of the Fourteenth Amendment turns on the asserted nonexistence of a contractual obligation to do that which the challenged statute exacts, one asserting such infringement must satisfy the court that he was not so bound. Shriver v. Woodbine Sav. Bank, 285 U. S. 467, 76 L. ed. 884, 52 S. Ct. 430.

The burden of proof is upon one asserting that a municipal ordinance is so unreasonable and arbitrary as to amount to a deprivation of property without due process of law. New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449.

It is incumbent upon the opponents of a Workman's Compensation Law to demonstrate that it is clearly unreasonable and arbitrary. Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537.

An act of a state legislature fixing rates for either passenger or freight transportation is to be regarded as prima facie valid, and the onus rests upon the carrier to prove its assertion to the contrary. Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764.

It is a settled principle of constitutional law that the government which has a right to do an act and is charged with the duty of doing that act must be allowed to select the means of doing it; and, those who contend that it may not adopt an appropriate means and that one particular mode of attaining the object is excepted assume the burden of establishing that exception. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125.

As to the burden of proof to show that the assailant has sufficient interest to question the validity of a statute, see supra, § 111.

[15] Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374; Gorieb v. Fox, 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A.L.R. 1210; Roberts & S. Co. v. Emmerson, 271 U. S. 50, 70 L. ed. 827, 46 S. Ct. 375, 45 A.L.R. 1495; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; People v. Hayne, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348, 17 Am. St. Rep. 211; State ex rel. Maxwell v. Kent-Coffey Mfg. Co. 204 N. C. 365, 168 S. E. 397, 90 A.L.R. 476, affirmed in 291 U. S. 642, 78 L. ed. 1040, 54 S. Ct. 437.

The presumption of validity which attends legislative and official actions imposes on one who alleges unreasonable discrimination the burden of showing it. Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830.

[16] Ex parte Ashton, 231 Ala. 497, 165 So. 773, 104 A.L.R. 54; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A. (N.S.) 188; State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Prata Undertaking Co. v. State Bd. of Embalming & Funeral Directing, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 66 A.L.R. 1553.

[17] Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

[18] Norman v. Baltimore & O. R. Co. 265 N. Y. 37, 191 N. E. 726, 92 A.L.R. 1523, affirmed in 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.

presumption in favor of the constitutionality of enactments of the legislative department of the government[19] apply not only to acts of the legislature, but to the action of all lawmaking bodies.[20] They have been applied to acts of Congress,[1] to joint resolutions of Congress,[2] to statutes adopted by state legislatures,[3] and to ordinances.[4]

While it must be remembered that the common-law requirement as to the reasonableness of ordinances is on a different basis from the constitutional limitation against unreasonable legislation in the exercise of the police power,[5] the courts are inclined to indulge the same general presumption in favor of the legality of legislation in the case of ordinances and bylaws of municipal corporations as in the analogous instance of acts of the state legislature. The right of the municipal authorities to decide on the reasonableness of regulations established by the corporation is generally recognized, and their decision is treated as controlling on the courts, unless the unreasonableness of the ordinance is fairly free from doubt.[6] It has also been said that when an ordinance is adopted prescribing rates of charge for the service of a public utility, pursuant to legislative authority, the action is attended with the same presumption of validity as in the case of other legislative acts.[7]

19 See supra, § 129.

20 State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827.

1 United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 S. Ct. 427.

2 Ann Arbor R. Co. v. United States, 281 U. S. 658, 74 L. ed. 1098, 50 S. Ct. 444.

3 Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 28 S. Ct. 441, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764; Chicago v. Manhattan Cement Co. 178 Ill. 372, 53 N. E. 63, 45 L.R.A. 848, 69 Am. St. Rep. 321; People v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L.R.A. 609; Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L.R.A. 478, 70 Am. St. Rep. 703; State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.
Annotation: 70 Am. St. Rep. 713.

4 New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 563, 74 L. ed. 617, 625, 50 S. Ct. 24, 29; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788; Jones v. Hines, 157 Ala. 624, 47 So. 739, 22 L.R.A.(N.S.) 1098; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Little Rock R. & Electric Co. v. Dowell, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086; Re Berry, 147 Cal. 523, 82 P. 44, 109 Am. St. Rep. 160; Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 P. 633, 38 L.R.A. 460, 62 Am. St. Rep. 261; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Chicago General R. Co. v. Chicago, 176 Ill. 253, 52 N. E. 880, 66 L.R.A. 959, 68 Am. St. Rep. 188; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 385; State ex rel. Dawson v. Atchison, 92 Kan. 431, 140 P. 873, Ann. Cas. 1916B, 500; Wells v. Mt. Olivet, 126 Ky. 131, 102 S. W. 1182, 11 L.R.A.(N.S.) 1080; Shreveport v. Dantes, 118 La. 113, 42 So. 716, 8 L.R.A.(N.S.) 394; Harrigan & R. Co. v. Burton, 224 Mich. 564, 195 N. W. 60, 33 A.L.R. 142; Lawson v. Judge of Recorder's Ct. (Lawson v. Connolly) 175 Mich. 375, 141 N. W. 623, 45 L.R.A.(N.S.) 1152; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; Minneota v. Martin, 124 Minn. 498, 145 N. W. 383, 51 L.R.A. (N.S.) 40, Ann. Cas. 1915B, 812; Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404, 28 A.L.R. 295; Home Teleph. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L.R.A. (N.S.) 1055, Ann. Cas. 1912D, 301; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L.R.A. 279; Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 13 S. W. 98, 8 L.R.A. 110, 18 Am. St. Rep. 530; Durham v. Southern R. Co. 185 N. C. 240, 117 S. E. 17, 35 A.L.R. 1313, affirmed in 266 U. S. 178, 69 L. ed. 231, 45 S. Ct. 51; State v. Staples, 157 N. C. 637, 73 S. E. 112, 37 L.R.A.(N.S.) 696; L. & M. Invest. Co. v. Cutler, 125 Ohio St. 12, 180 N. E. 379, 86 A.L.R. 707; Mayhew v. Eugene, 56 Or. 102, 104 P. 727, Ann. Cas. 1912C, 33; Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958; Colton v. South Dakota Cent. Land Co. 25 S. D. 309, 126 N. W. 507, 28 L.R.A.(N.S.) 122; Ex parte Cramer, 62 Tex. Crim. Rep. 11, 136 S. W. 61, 36 L.R.A.(N.S.) 78, Ann. Cas. 1913C, 588; Elsner Bros. v. Hawkins, 113 Va. 47, 73 S. W. 479, Ann. Cas. 1913D, 1278; Wood v. Seattle, 23 Wash. 1, 62 P. 135, 52 L.R.A. 369.
Annotation: Ann. Cas. 1916B, 502.

5 See infra, § 307.
See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 805, §§ 112 et seq.].

6 Tacoma v. Keisel, 68 Wash. 685, 124 P. 137, 40 L.R.A.(N.S.) 757.

7 Home Teleph. Co. v. Carthage, 235 Mo. 644, 139 S. W. 547, 48 L.R.A.(N.S.) 1055, Ann. Cas. 1912D, 301.

H. Factors Not Considered by Courts in Determining Validity of Legislation

1. In General

§ 134. Generally.—Statutes are the creations of the minds of legislators; and since legislators are men, their creations are subject to the same critical analysis concerning wisdom, policy, fairness, justice, and expediency as other human acts. In directing attacks on laws assailed as unconstitutional, attempts are often made to stress these frailties as reasons why the courts should nullify the legislative pronouncement. These attacks uniformly fail for several reasons, many of which are set forth in detail in the following sections of this article.[8]

The reason for this judicial position—namely, that legislative acts may be assailed only from the standpoint of power—has a large part of its roots in the doctrine in our law that the state Constitutions are not grants of, but limitations on, the power of the legislature,[9] which possesses and may exercise within constitutional limits all powers as it sees fit.[10] Hence, courts, in accordance with the doctrine of the separation of powers,[11] will not seek to substitute their judgment for that of another co-ordinate branch of the government, but will only measure acts done with the yardsticks of the Constitutions. Since the powers of the Federal Government are granted in ascertaining the validity of the acts of Congress, the Federal legislature, the courts only look to see if the acts legislated are within the purview, from the standpoint of potentiality, of those powers expressly given to the Congress or recognized as granted to it by implication, and yet are not prohibited by the Federal Constitution.[12]

§ 135. Spirit of Constitution and Natural Rights.—It is now a well-established rule of constitutional law that courts are not at liberty to declare an act void because it is opposed to the spirit supposed to pervade the Constitution,[13] against the nature and spirit of the government,[14] or is contrary to the

8 See infra, §§ 135 et seq.

9 See supra, § 18.

10 See infra, § 193.

11 See infra, §§ 180 et seq.

12 See infra, §§ 169, 172 et seq.

13 Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Kane v. Erie R. Co. (C. C. A. 6th) 133 F. 681, 68 L.R.A. 788; Ex parte Owens, 148 Ala. 402, 42 So. 676, 8 L.R.A.(N.S.) 888, 121 Am. St. Rep. 67; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; State ex rel. Johnson v. Johns, 92 Fla. 187, 109 So. 228, citing R. C. L.; Neisel v. Moran, 80 Fla. 98, 85 So. 346, citing R. C. L.; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L.R.A. 819; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; French v. State, 141 Ind. 618, 41 N. E. 2, 29 L.R.A. 113; State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; State ex rel. Nolan v. Montana R. Co. 21 Mont. 221, 53 P. 623, 45 L.R.A. 271; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; State v. De Lorenzo, 81 N. J. L. 613, 79 A. 839, Ann. Cas. 1912D, 329; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Russ v. Com. 210 Pa. 544, 60 A. 169, 1 L.R.A. (N.S.) 409, 105 Am. St. Rep. 825; Com. v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 626, 59 S. E. 476, 17 L.R.A.(N.S.) 324; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

Contra.—McDonald v. Doust, 11 Idaho, 14, 81 P. 60, 69 L.R.A. 220; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L.R.A. 808, 20 Am. St. Rep. 123, and the dissenting opinion of Bradley, J., expressed in the Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496, wherein he said that "the

general principles of liberty[15] or genius of a free people.[16] Therefore, the spirit of the Federal Constitution or its preamble cannot be invoked, apart from the words of that instrument, to invalidate a state statute[17] or a state constitutional amendment.[18] On the same general principle is founded the accepted doctrine that courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the Constitution.[19]

It has been said that in every case in which an act is declared to be unconstitutional, the courts must be able to point out the specific provision of the Constitution which is violated by the statute which is stricken down as invalid.[20] This rule does not, however, under the view taken in many jurisdictions, prevent the eradication of those laws which violate the implied limitations in the Constitution.[1] In all constitutions there are necessarily certain propositions which the instruments import, as well as those they expressly and in terms assert; it is settled that legislation contravening what the Constitution necessarily implies is void equally with the legislation contravening its express commands.[2]

It is now generally recognized that the judiciary cannot annul or pronounce void any act of the legislature on any ground other than that of repugnancy to the Constitution. It was at one time supposed that the courts could resort

law which violates the spirit of the Constitution is as much unconstitutional as one that violates its letter."

Before a statute can be held unconstitutional, it must appear to be in conflict with some constitutional provision or be opposed to natural right or the fundamental principles of civil liberty. Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

14 Louisville & N. R. Co. v. County Ct. 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L.R.A. 504.

15 Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Louisville & N. R. Co. v. County Ct. 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

16 Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126.

17 Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

The preamble of the Federal Constitution is not a grant or delegation of power, but merely a generic statement of the great aims and ends of our National Government. Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

18 Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7

19 State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Brooke Academy v. George, 14 W. Va. 411, 35 Am. Rep. 760.

20 State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436; Ex parte Owens, 148 Ala. 402, 42 So. 676, 8 L.R.A.(N.S.) 888, 121 Am. St. Rep. 67; Anderson v. Ocala, 67 Fla. 204, 64 So. 775, 52 L.R.A.(N.S.) 287; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918E, 574; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897; State ex rel. Linde v. Pacard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Lawrence University v. Outagamie County, 150 Wis. 244, 136 N. W. 619, 2 A.L.R. 465; Zancanelli v. Central Coal & Coke Co. 25 Wyo. 511, 173 P. 983, citing R. C. L.

1 See infra, § 194.

2 State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Jackson v. Jackson, 90 Fla. 563, 107 So. 255, citing R. C. L.; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; Hopper v. Britt, 203 N. Y. 144, 96 N. E. 371, 37 L.R.A.(N.S.) 825, Ann. Cas. 1913B, 172.

That which is implied in a Constitution is as much a part of it and is as effective as that which is expressed; and grades or degrees of implication, if there are any, do not affect the operation of the Constitution to nullify statutes that are duly adjudged to be in conflict with the Constitution. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

See also infra, § 194.

to the principles of natural justice or common right and pronounce a legislative act void because in conflict with such supposed principles. This view, however, has been finally abandoned.[3] The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions,[4] and all acts of the legislature are valid unless they so conflict.[5] Hence, if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere,[6] for they do not sit to review or revise legislative action within its constitutional limits.[7] Therefore, the courts have no right to set aside, arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority on the ground that it conflicts with their notions of natural,[8] social, or political rights of the citizen not guaranteed by the Constitution itself.[9]

3 State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; State v. Hay, 126 N. C. 999, 35 S. E. 459, 49 L.R.A. 588, 78 Am. St. Rep. 691; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897; Guthrie v. Territory, 1 Okla. 188, 31 P. 190, 21 L.R.A. 841, overruled on another point in Guthrie v. New Vienna Bank, 4 Okla. 194, 38 P. 1; Darlington v. Ward, 48 S. C. 570, 26 S. E. 906, 38 L.R.A. 326; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628; Re Milecke, 52 Wash. 312, 100 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Annotation: 21 L.R.A. 789.

A law may be repugnant to general principles of justice, liberty, and rights not expressed in the Constitution, and yet the courts have no power to strike it down. Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270.

There was some authority for the view that in England as well as in this country, if a statute, owing to some oversight or mistake of its makers, directed that to be done which was palpably absurd, unnatural, unjust, or impracticable, it had, apart from any constitutional restriction, to be regarded as absolutely void, on the ground of its being impracticable innocently to execute it, because of its obscurity, absurdity, repugnance, or injustice. Flint River S. B. Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178; Campbell's Case, 2 Bland, Ch. (Md.) 209, 20 Am. Dec. 360; University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; St. Paul v. Colter, 12 Minn. 41, Gil. 16, 90 Am. Dec. 278; East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174; Green, J., in Bank of State v. Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

4 Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

The courts can restrain the execution of a statute only when it conflicts with either the Federal or state Constitution. State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

5 University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A.1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720.

6 Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

7 Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010.

The court's only duty and power is to scrutinize a statute with reference to its constitutionality. Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A. (N.S.) 977, Ann. Cas. 1915B, 157.

The duty and the sole duty of the courts when the constitutional power of the legislature to enact a law is questioned is to look to the provisions of the Federal and state Constitutions, and if they do not, in express terms, or by necessary and proper implication, forbid the exercise of such power, the enactment must be adjudged valid and enforceable as a law. Beyond the constitutional restrictions thus to be interpreted, the only limits upon the state legislature in enacting laws are its own wisdom, sound judgment, and patriotism. Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540.

8 Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A. (N.S.) 1023, Ann. Cas. 1915B, 1136; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; Burrows v. Delta Transp. Co. 106 Mich. 582, 64 N. W. 501, 29 L.R.A. 468; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

9 State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.

2. As to Fairness and Justice of Legislation

§ 136. Harshness, Hardship, and Unreasonableness.—The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds is for the legislature exclusively, and that in ordinary cases the courts have no revisory power concerning it[10] nor any power to substitute their opinion for the judgment of the legislature.[11] Mere unreasonableness does not necessarily render a statute unconstitutional.[12] This rule does not mean that constitutional guaranties can be violated by unreasonableness. Thus, the courts may inquire whether an act of Congress is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end.[13] If, however, there is room for fair debate as to whether a municipal ordinance is arbitrary or unreasonable, the court will not substitute its own judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.[14]

Courts are not at liberty to declare statutes invalid although they may be harsh,[15] unfair,[16] abused and misused,[17] may afford an opportunity for abuse in the manner of application,[18] may create hardships[19] or inconvenience,[20] or

(N.S.) 699, Ann. Cas. 1915A, 1163; State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Brooke Academy v. George, 14 W. Va. 411, 35 Am. Rep. 760.

[10] Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 107, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Green River v. Fuller Brush Co. (C. C. A. 10th) 65 F. (2d) 112, 88 A.L.R. 177; Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773, 5 L.R.A.(N.S.) 588, 7 Ann. Cas. 154; Britton v. Election Comrs. 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; State ex rel. Starke County v. Laramore, 175 Ind. 478, 94 N. E. 761, Ann. Cas. 1913B, 1296; State v. Bolden, 107 La. 116, 31 So. 393, 90 Am. St. Rep. 280; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

[11] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; Fearon v. Treanor, 272 N. Y. 268, 5 N. E. (2d) 815, 109 A.L.R. 1229.

[12] Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933; Nebraska Dist. v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A.L.R. 1688.

[13] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.

As to police power generally, see infra, §§ 305, 306.

As to discriminatory laws of classification, see Vol. 12, Subd. XIII.

[14] Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530.

[15] Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 S. Ct. 663; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331; State v. Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725.

[16] Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Cochran v. Com. (Fidelity & C. Trust Co. v. Com.) 241 Ky. 656, 44 S. W. (2d) 603, 78 A.L.R. 710; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460 (tax law).

[17] U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173.

[18] Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

[19] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530; Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260, 40 S. Ct. 141; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; United States v. Singer, 15 Wall. (U. S.) 111, 21 L. ed. 49; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; San Christina Invest. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.(N.S.) 676; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; McAllister v. Fair, 72 Kan. 533, 84 P. 112, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas.

may be oppressive,[1] mischievous in their effects, burdensome on the people, and of doubtful propriety.[2]

The courts are not the guardians of the rights of the people against oppressive legislation which does not violate the provisions of the Constitution.[3] The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves or of their legislative representatives.[4]

§ 137. Injustice.—Because of the fact that the validity of statutes is determined solely by ascertaining whether or not they are within the purview of legislative powers as limited by the Federal and state Constitutions, and by those limitations alone, the rule is established beyond controversy that the justice or injustice of statutory provisions is for the legislature, not for the court, and statutes cannot be declared invalid on such grounds.[5]

973; State ex rel. Taylor v. Mirabal, 33 N. M. 553, 273 P. 928, 62 A.L.R. 296; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 559.

[20] United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Ex parte Kearney, 7 Wheat. (U. S.) 38, 5 L. ed. 391; San Christina Invest. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A. (N.S.) 676; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Re Opinion of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; Com. v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801.

[1] District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Robinson v. Hamilton, 69 Iowa, 134, 14 N. W. 202, 46 Am. Rep. 63; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; Burrows v. Delta Transp. Co. 106 Mich. 582, 64 N. W. 501, 29 L.R.A. 468; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548 (apportionment of election districts); State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100; Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 626, 59 S. E. 476, 17 L.R.A.(N.S.) 324.

A state, in its purposes and in the execution of them, must be allowed a wide range of discretion, and the Federal Supreme Court will not make itself a harbor in which can be found a refuge from ill-advised, unequal, and oppressive legislation. Billings v. Illinois, 188 U. S. 97, 47 L. ed. 400, 23 S. Ct. 272.

[2] United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

[3] Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450.

[4] McCrary v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Champion v. Ames, 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322, 129 Am. St. Rep. 299; Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A. (N.S.) 977; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Com. ex rel. Elkin v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801.

Annotation: 1 Ann. Cas. 570.

[5] United States v. First Nat. Bank, 234 U. S. 245, 58 L. ed. 1298, 34 S. Ct. 846; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 S. Ct. 594; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Withers v. Buckley, 20 How. (U. S.) 84, 15 L. ed. 816; Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939; Masses Pub. Co. v. Patton (C. C. A. 2d) 246 F. 24, L.R.A. 1918C, 79, Ann. Cas. 1918B, 999; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Chicago, B. & Q. R. Co. v. Doyle, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385; State ex rel. Davening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Cochran v. Com. 241 Ky. 656, 44 S. W. (2d) 603, 78 A.L.R. 710; Bangor v. Pierce, 106 Me. 527, 76 A. 945, 29 L.R.A.(N.S.) 770, 138 Am. St. Rep. 363; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548 (apportionment of election districts); People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Com. v. Girard L. Ins. Co. 305 Pa. 558, 158 A. 262, 83 A.L.R. 460, affirmed in 287 U. S. 570, 77 L. ed. 501, 53 S. Ct. 94.

It is not the province of the court to decide upon the justice or injustice of laws, since the decision of that question belongs to the lawmaking power, the duty of the court being to interpret the instrument as framed and to administer it as found according to its true intent and meaning

Legislative acts within the power of the legislative body are not subject to revision or control by the courts on the ground of absurdity, injustice, or like impropriety,[6] because they are contrary to the principles of natural justice,[7] are based on conceptions of morality with which the courts may disagree,[8] or even because they create unjust differences not prohibited by the Constitution.[9]

3. As to Propriety, Expediency, Wisdom, and Necessity of Legislation

§ 138. Generally.—One of the most firmly established groups of principles which has become cardinal and elementary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people who, by making the necessary changes in the legislative body, may have the improvident or pernicious legislation of one legislature corrected by its successors.[10] In other words, the legislature is the judge of the necessity, utility, and expediency of the appropriation of private

when it was adopted. Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691.

6 State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 7, 29 S. Ct. 14; Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Correll v. Williams & H. Co. 173 Iowa, 571, 155 N. W. 982, Ann. Cas. 1918A, 117; Cochran v. Com. (Fidelity & C. Co. v. Com.) 241 Ky. 656, 44 S. W. (2d) 603, 78 A.L.R. 710; Corbin v. Houlehan, 100 Me 246, 61 A. 131, 70 L.R.A. 568; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170, 69 A.L.R. 1024; Burrows v. Delta Transp. Co. 106 Mich. 582, 64 N. W. 501, 29 L.R.A. 468; State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Nebraska Dist. v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A.L.R. 1688; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Com. ex rel. Elkin v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801; O'Hagan v. Fraternal Aid Union, 144 S. C. 84, 141 S. E. 893, 57 A.L.R. 397; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100; Armington v. Barnet, 15 Vt. 745, 40 Am. Dec. 705; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893; State v. Bowen, 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

7 New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322, 129 Am. St. Rep. 299, writ of error dismissed in 218 U. S. 487, 54 L. ed. 1121, 31 S. Ct. 43; Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Burrows v. Delta Transp. Co. 106 Mich. 582, 64 N. W. 501, 29 L.R.A. 468; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157; Rio Grande Lumber Co. v. Darke, 50 Utah. 114, 167 P. 241, L.R.A.1918A, 1193; Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va. 626, 59 S. E. 476, 17 L.R.A.(N.S.) 324; Re Milecke, 52 Wash. 213, 100 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968.

A law cannot be held invalid merely because some innocent person may probably suffer. People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

8 Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; State v. Crowe, 130 Ark. 272, 197 S. W. 4, L.R.A. 1918A, 567, Ann. Cas. 1918D, 460; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

9 People v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770.

10 **United States.**—Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352; Burroughs v. United States, 290 U. S. 534, 78 L. ed. 484, 54 S. Ct. 287; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Standard Oil Co. v. Marysville, 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; United States v. Baltimore Post, 268 U. S. 368, 69 L. ed. 1009, 45 S. Ct. 560; United States v. Dickey, 268 U. S. 378, 69 L. ed. 1006, 45 S. Ct. 558; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Wilson v. New, 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298, L.R.A.1917E, 938, Ann. Cas. 1918A, 1024; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A.1917D, 414, Ann. Cas. 1917B, 713; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; United States v. First Nat. Bank, 234 U. S. 245, 58 L. ed. 1298, 34 S. Ct. 846; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 S. Ct. 152; Noble State Bank v. Haskell, 219 U. S. 575, 55 L. ed. 341, 31 S. Ct. 299, 32 L.R.A.(N.S.) 1065; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259, affirming 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122, affirming 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 S. Ct. 270; McCrary v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 S. Ct. 623; De Pater v. United States (C. C. A. 4th) 34 F. (2d) 275, 74 A.L.R. 1413; Masses Pub. Co. v. Patton (C. C. A. 2d) 246 F. 24, L.R.A.1918C, 79, Ann. Cas. 1918B, 999.

Alabama.—Ex parte Birmingham, 199 Ala. 9, 74 So. 51, citing R. C. L.; Mobile v. Orr, 181 Ala. 308, 61 So. 920, 45 L.R.A. (N.S.) 575.

Arizona.—Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L.R.A.1917B, 774, Ann. Cas. 1918C, 772; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Missouri & N. A. R. Co. v. State, 92 Ark. 1, 121 S. W. 930, 31 L.R.A. (N.S.) 861, 135 Am. St. Rep. 164; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275.

California.—Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A. (N.S.) 260, 14 Ann. Cas. 1080, affirmed in 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301; Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Britton v. Election Comrs. 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115; Spier v. Baker, 120 Cal. 370, 52 P. 659, 41 L.R.A. 196; Rode v. Siebe, 119 Cal. 518, 51 P. 869, 39 L.R.A. 342; Re Madera Irrig. Dist. 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106.

Colorado.—People ex rel. Moore v. Perkins, 56 Colo. 17, 137 P. 55, Ann. Cas. 1914D, 1154; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309.

Connecticut.—Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

Delaware.—Walsh v. State, 33 Del. 4, 139 A. 257, 56 A.L.R. 810; Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D, 104.

Florida.—Williams v. Jacksonville, 118 Fla. 671, 160 So. 15, 98 A.L.R. 513; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965.

Georgia.—Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Cureton v. State, 135 Ga. 660, 70 S. E. 332, 49 L.R.A.(N.S.) 182, writ of error dismissed in 229 U. S. 630, 57 L. ed. 1358, 33 S. Ct. 778; Americus v. Perry, 114 Ga. 871, 40 S. E. 1004, 57 L.R.A. 230; Winter v. Jones, 10 Ga. 190, 54 Am. Dec. 379.

Idaho.—Re Crane, 27 Idaho, 671, 151 P. 1006, L.R.A.1918A, 942, affirmed in 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; Re Gemmill, 20 Idaho, 732, 119 P. 298, 41 L.R.A. (N.S.) 711, Ann. Cas. 1913A, 76; Re Sharp, 15 Idaho, 120, 96 P. 563, 18 L.R.A.(N.S.) 886; State v. Dolan, 13 Idaho, 693, 92 P. 995, 14 L.R.A.(N.S.) 1259.

Illinois.—Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785, L.R.A.1915C, 328, Ann. Cas. 1916A, 674; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772; G. S. Johnson Co. v. Beloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Chicago, B. & Q. R. Co. v. Doyle, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385; People ex rel. Bruce v. Dunne, 258 Ill. 441, 101 N. E. 560, 45 L.R.A.(N.S.) 500; People ex rel. Fitz Henry v. Union Gas & E. Co. 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916B, 201; Polzin v. Rand, McN. & Co. 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 904; People ex rel.

Moloney v. Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277.

Indiana.—Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; State ex rel. Davening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Grand Trunk W. R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L.R.A.(N.S.) 850, reversed on other grounds in 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A. (N.S.) 461; State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L.R.A. 566; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Johnston v. State, 128 Ind. 16, 27 N. W. 422, 25 Am. St. Rep. 412, 12 L.R.A. 235; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L.R.A. 370, 22 Am. St. Rep. 624; State ex rel. Clark v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L.R.A. 240; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L.R.A. 576, 16 Am. St. Rep. 396; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Hedderich v. State, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768; Bepley v. State, 4 Ind. 264, 58 Am. Dec. 628.

Iowa.—State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. E. 921, 23 A.L.R. 1322; State ex rel. Jones v. Sargent, 145 Iowa, 298, 124 N. W. 339, 139 Am. St. Rep. 439, 27 L.R.A. (N.S.) 719; McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; Park Comrs. v. Diamond Ice Co. 130 Iowa, 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103, 8 Ann. Cas. 28; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L.R.A. 436, 31 Am. St. Rep. 477.

Kansas.—Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.—Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L.R.A.(N.S.) 989; Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454; Com. v. Fowler, 96 Ky. 166, 28 S. W. 786, 33 L.R.A. 839.

Louisiana.—Treigle v. Acme Homestead Asso. 181 La. 941, 160 So. 637, 98 A.L.R. 69, reversed on other grounds in 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, which has rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587, 588; State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; Re Schwartz, 119 La. 290, 44 So. 20, 121 Am. St. Rep. 516; State v. Olympic Club, 46 La. Ann. 935, 15 So. 190, 24 L.R.A. 452.

Maine.—Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Farren v. Maine C. R. Co. 112 Me. 81, 90 A. 497, 52 L.R.A.(N.S.) 203; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Donahoe v. Richards, 38 Me. 379, 16 Am. Dec. 256; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655, affirmed in 14 How. (U. S.) 568, 14 L. ed. 545.

Maryland.—Short v. State, 80 Md. 392, 31 A. 322, 29 L.R.A. 404.

Massachusetts. — Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, 42 L.R.A.(N.S.) 1188, Ann. Cas. 1913E, 1116; Bailey v. Wood, 202 Mass. 549, 89 N. E. 147, 25 L.R.A. (N.S.) 722; Nelson v. Blinn, 197 Mass. 279, 83 N. E. 889, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147; Opinion of Justices, 166 Mass. 589, 595, 44 N. E. 625, 34 L.R.A. 58; Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216.

Michigan.—Boyer-Campbell Co. v. Fry, 271 Mich. 282, 260 N. W. 165, 98 A.L.R. 827; Reichert v. Farmers & W. Sav. Bank, 257 Mich. 500, 242 N. W. 239, 81 A.L.R. 1461; Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1123; Vernor v. Secretary of State, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915D, 128; Flint & F. Pl. Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233.

Minnesota.—State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; State ex rel. Foot v. Bazille, 97 Minn. 11, 106 N. W. 93, 6 L.R.A.(N.S.) 732, 7 Ann. Cas. 1056; State ex rel. Hoffman v. Justus, 91 Minn. 447, 98 N. W. 325, 64 L.R.A. 510, 103 Am. St. Rep. 521, 1 Ann. Cas. 91.

Mississippi.—State ex rel. Collins v. Senatobia Blank Book & Stationery Co. 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953; University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A.1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851.

Missouri.—Star Square Auto Supply Co. v. Gerk, 325 Mo. 968, 30 S. W. (2d) 447, citing R. C. L.; State ex rel. Asotsky v. Regan, 317 Mo. 1216, 298 S. W. 747, 55 A.L.R. 773; Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404, 28 A.L.R. 295; State ex rel. Barker v. Merchants' Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A.(N.S.) 179; Henry & C. Co. v. Evans, 97 Mo. 47, 10 S. W. 868, 3 L.R.A. 332; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Montana.—McDaniel v. Eagle Coal Co. 99 Mont. 309, 43 P. (2d) 655, 99 A.L.R. 1492; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424; State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 P. 841, citing R. C. L.; State ex rel. Goodman v. Stewart, 57 Mont. 144, 187 P. 641, citing R. C. L.; Hill v. Rae 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

Nebraska.—Steinacher v. Swanson, 131 Neb. 459, 268 N. W. 317, citing R. C. L.; State v. Drayton, 82 Neb. 254, 117 N. W. 763, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671; State v. Heidenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513.

Nevada.—State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A. 1916A, 696, Ann. Cas. 1916E, 1097; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66.

New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 183, 94 A.L.R. 1067; State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A. (N.S.) 1115; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; State v. Marshall, 64 N. H. 549, 15 A. 210, 1 L.R.A. 51.

New York.—People v. Gowasky, 244 N. Y. 451, 155 N. E. 737, 58 A.L.R. 9; People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; People v. Westchester County Nat. Bank, 231 N. Y. 465, 132 N. E. 241, 15 A.L.R. 1344; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L.R.A.(N.S.) 744, 16 Ann. Cas. 695, affirmed in 221 U. S. 467, 55 L. ed. 815, 31 S. Ct. 709; People ex rel. Sturgis v. Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L.R.A. 419; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712, affirmed in 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

North Carolina.—Gill v. Wake County, 160 N. C. 176, 76 S. E. 203, 43 L.R.A.(N.S.) 293; Taylor v. Newberne, 55 N. C. (2 Jones, Eq.) 141, 64 Am. Dec. 566.

North Dakota.—Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Ohio.—Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

Oklahoma.—Dixon v. Shaw, 122 Okla. 211, 253 P. 500, 50 A.L.R. 1232; Guthrie v. Territory, 1 Okla. 188, 31 P. 190, 21 L.R.A. 841.

Oregon.—Portland Van & Storage Co. v. Hoss, 139 Or. 434, 9 P. (2d) 122, 81 A.L.R. 1136; Fouts v. Hood River, 46 Or. 492, 81 P. 370, 1 L.R.A.(N.S.) 483, 7 Ann. Cas. 1160; Simon v. Northrup, 27 Or. 487, 40 P. 560, 30 L.R.A. 171.

Pennsylvania.—Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Com. v. Pflaum 50 Pa. Super. Ct. 55, affirmed in 236 Pa. 294, 84 A. 842, Ann. Cas. 1913E, 1287.

Rhode Island.—State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339; State v. Narragansett, 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.

South Carolina.—Poulnot v. Cantwell, 129 S. C. 171, 123 S. E. 651, citing R. C. L.; State ex rel. Lyon v. Rhame, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 1914B, 519; Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958.

South Dakota.—State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 127 N. W. 650, 35 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 700; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 N. W. 127, 41 L.R.A.(N.S.) 149; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66.

Tennessee.—State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Texas.—Denton v. Denton Home Ice Co. 119 Tex. 193, 27 S. W. (2d) 119, 68 A.L.R. 866; St. Louis Southwestern R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Snodgrass v. State, 67 Tex. Crim. Rep. 615, 150 S. W. 162, 41 L.R.A.(N.S.) 1144.

Utah.—Ashton-Jenkins Co. v. Bramel, 56 Utah, 587, 192 P. 375, 11 A.L.R. 752; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

Vermont.—State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A. (N.S.) 766, 18 Ann. Cas. 496.

Virginia.—Hardin v. Radford, 112 Va. 547, 72 S. E. 101, Ann. Cas. 1913B, 858; Com. v. Henry, 110 Va. 879, 65 S. E. 570, 26 L.R.A.(N.S.) 883; Zircle v. Southern R. Co. 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805; Virginia Develop. Co. v. Crozier Iron Co. 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893.

Washington.—State ex rel. Stimson Timber Co. v. Kuykendall, 137 Wash. 602, 243 P. 834, 55 A.L.R. 954, affirmed in 275 U. S. 207, 72 L. ed. 241, 48 S. Ct. 41; State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A. 1917B, 1276; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; Sallaske v. Fletcher, 73 Wash. 593, 132 P. 648, 47 L.R.A.(N.S.) 320, Ann. Cas. 1914D, 760; Freeman v. Centralia, 67 Wash. 142, 120 P. 486, Ann. Cas. 1913D, 786; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; Bussell v. Gill, 58 Wash. 468, 108 P. 1080, 137 Am. St. Rep. 1070; Hansard v. Green (Hansford v. Harrington) 54 Wash. 161, 103 P. 40, 24 L.R.A.(N.S.) 1273, 132 Am. St. Rep. 1107; State ex rel. Atkinson v. Northern P. R. Co. 53 Wash. 673, 102 P. 876, 17 Ann. Cas. 1013, reversed on other grounds in 222 U. S. 370, 56 L. ed. 237, 32 S. Ct. 160; State v. Sharpless, 31 Wash. 191, 71 P. 737, 96 Am. St. Rep. 893.

West Virginia.—Cunningham v. Cokely, 79 W. Va. 60, 90 S. E. 546, L.R.A.1917B, 718; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Wisconsin.—State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69

property to a public use.[11] Even the fact that an act as written opens the door to blackmailing operations on a large scale is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of the legislature. Such considerations are more appropriately addressed to the legislative branch of the government, which alone has authority to enact and may, if it sees fit, amend the law.[12] Moreover, the mere fact that a law would necessitate the incurring of large expense cannot be alleged as a sufficient reason for not obeying its provisions if it is otherwise valid.[13] This principle extends to administrative regulations which derive their force from the legislature as a source. For example, the necessity for prescribing a standard container for strawberries and raspberries packed for sale and of making its use mandatory involves questions of fact or policy the determination of which rests with the legislative branch of the state government and may be made, if the Constitution of the state permits, by a subordinate administrative body.[14] Moreover, the courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such Commission, upon the ground that such power is unwisely or inexpediently exercised.[15]

Each of these factors has been many times specifically repudiated as a possible basis for invalidating legislation. This judicial position has given rise to the oft-repeated mandate that the courts can have no concern as to the expediency,[16] the wisdom,[17] or the necessity for the enactment of laws.[18] As has

A.L.R. 348; Wait v. Pierce, 191 Wis. 202, 209 N. W. 475, 210 N. W. 822, 48 A.L.R. 276; First Wisconsin Nat. Bank v. John, 179 Wis. 117, 190 N. W. 822, 26 A.L.R. 349; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; Brodhead v. Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

Wyoming.—State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 45 P. 494, 34 L.R.A. 835, 71 Am. St. Rep. 926.

Annotation: 41 Am. St. Rep. 134; 53 Am. St. Rep. 300; 1 Ann. Cas. 570, 571.

An act cannot be declared unconstitutional merely because in the opinion of the courts it is unsuited to its ostensible end. Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455.

While a court may not substitute its judgment for the discretion of the lawmaking body, where the effectiveness of an act is doubtful, it may weigh this doubtful element in connection with the interference of property rights in determining the validity of the act. State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

[11] Aldridge v. Tuscumbia, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; Re Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631.

[12] Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 S. Ct. 192, L.R.A.1917F, 502, Ann. Cas. 1917B, 1168.

[13] Atty.-Gen. ex rel. Conely v. Detroit, 78 Mich. 545, 44 N. W. 388, 7 L.R.A. 99, 18 Am. St. Rep. 458.

A workmen's compensation act will not be held invalid on the ground that it will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[14] Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853.

[15] Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 S. Ct. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 S. Ct. 155.

[16] Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Legal Tender Case, 110 U. S. 431, 28 L. ed. 204, 4 S. Ct. 122; Livingston County v. Darlington, 101 U. S. 407, 25 L. ed. 1015; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R.

1018; Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; State ex rel. Smith v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 271; Blue v. State, 206 Ind. 158, 96 A.L.R. 271; Blue v. State, 206 Ind. 98, 188 N. E. 583, 91 A.L.R. 334; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; State ex rel. Davening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Bepley v. State, 4 Ind. 264, 58 Am. Dec. 628; Drury v. Franke, 247 Ky. 753, 57 S. W. (2d) 969, 88 A.L.R. 917; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; State v. Mayo, 106 Me. 62, 75 A. 295, 26 L.R.A.(N.S.) 502, 20 Ann. Cas. 512; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, affirmed in 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404, 28 A.L.R. 295; State ex rel. Barker v. Merchants' Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Moler v. Wishman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165, affirmed in 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430; Roswell v. Bateman, 20 N. M. 77, 146 P. 950, L.R.A.1917D, 365, Ann. Cas. 1918D, 426; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Louisville & N. R. Co. v. County Ct. 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; St. Louis S W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Ex parte Allison, 48 Tex. Crim. Rep. 634, 90 S. W. 492, 3 L.R.A.(N.S.) 622, 13 Ann. Cas. 684; Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224; Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A. 1918C, 909, Ann. Cas. 1918C, 942; Sallaske v. Fletcher, 73 Wash. 593, 132 P. 648, 47 L.R.A. (N.S.) 320, Ann. Cas. 1914D, 760; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

The expediency of statutes relating to taxation, within constitutional limits, is a subject with which the courts will not intermeddle. Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552; Nathan v. Spokane County, 35 Wash. 26, 76 P. 521, 65 L.R.A. 336, 102 Am. St. Rep. 888.

[17] **United States.**—Senn v. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857; Cincinnati Soap Co. v. United States, 301 U. S. 308, 81 L. ed. 1122, 57 S. Ct. 764; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530 (ordinance); Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; Standard Oil Co. v. Marysville, 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; United States v. Baltimore Post, 268 U. S. 388, 69 L. ed. 1009, 45 S. Ct. 560 (income tax returns); United States v. Dickey, 268 U. S. 378, 69 L. ed. 1006, 45 S. Ct. 558, 38 A.L.R. 1370 (income tax returns); James Everard's Breweries v. Day, 265 U. S. 545, 68 L. ed. 1174, 44 S. Ct. 628; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Armour v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421; Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720, affirming 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588, Ann. Cas. 1916E, 522; Fox v. Washington, 236 U. S. 273, 59 L. ed. 573, 35 S. Ct. 383; United States v. First Nat. Bank, 234 U. S. 245, 58 L. ed. 1298, 34 S. Ct. 846; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A.(N.S.) 1062, Ann. Cas. 1912A, 487; Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 S. Ct. 544, 19 Ann. Cas. 705; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 S. Ct. 336; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 S. Ct. 190; Fong Yue Ting v.

United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114 (quarantine laws); Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 S. Ct. 211; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Nichol v. Levy, 5 Wall. 433, 18 L. ed. 596; Withers v. Buckley, 20 How. 84, 15 L. ed. 816; Providence Bank v. Billings, 4 Pet. 514, 7 L. ed. 939; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; De Pater v. United States (C. C. A. 4th) 34 F. (2d) 275, 74 A.L.R. 1413; Masses Pub. Co. v. Patton (C. C. A. 2d) 246 F. 24, L.R.A.1918C, 79, Ann. Cas. 1918B, 999.

Alabama.—State v. Alabama Fuel & Iron Co. 188 Ala. 487, 66 So. 169, L.R.A.1915A, 185, Ann. Cas. 1916E, 752.

Arizona.—Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275.

California.—Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531.

Colorado.—People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177.

Connecticut.—Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; State v. Conlon, 65 Conn. 478, 33 A. 519, 31 L.R.A. 55, 48 Am. St. Rep. 227.

Delaware.—Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

Florida.—State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

Georgia.—Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A. 1917D, 926, Ann. Cas. 1917E, 685; Morris v. Columbus, 102 Ga. 792, 30 S. E. 850, 42 L.R.A. 175, 66 Am. St. Rep. 243.

Idaho.—Pike v. State Land Comrs. 19 Idaho, 268, 113 P. 447, Ann. Cas. 1912B, 1344.

Illinois.—Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; Chicago, B. & Q. R. Co. v. Doyle, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385; People ex rel. Fitz Henry v. Union Gas & E. Co. 254 Ill. 395, 98 N. E. 763, Ann. Cas. 1916B, 201; Chicago v. Manhattan Cement Co. 178 Ill. 372, 53 N. E. 68, 45 L.R.A. 848, 69 Am. St. Rep. 321.

Indiana.—Local Union, N. B. O. P. v. Kokomo, — Ind. —, 5 N. E. (2d) 624, 108 A.L.R. 1111; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 153, 96 A.L.R. 271; Blue v. State, 206 Ind. 98, 188 N. E. 583, 91 A.L.R. 334; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A. 1915D, 458; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; State ex rel. Davening v. Bartholomew, 176 Ind. 182, 95 N. E. 417, Ann. Cas. 1914B, 91; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146.

Iowa.—State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; Bopp v. Clark, 165 Iowa, 697, 147 N. W. 172, 52 L.R.A.(N.S.) 493, Ann. Cas. 1916E, 417; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

Kansas.—Wheeler v. Weightman, 96 Kan. 50, 149 P. 977, L.R.A.1916A, 846.

Kentucky.—Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Kentucky State Journal Co. v. Workmen's Compensation Bd. 161 Ky. 562, 182 Ky. 387, 170 S. W. 437, 1166, 172 S. W. 674, L.R.A.1916A, 389, Ann. Cas. 1916B, 1273.

Louisiana.—State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262.

Maine.—Corbin v. Houlehan, 100 Me. 246, 61 A. 131, 70 L.R.A. 563.

Massachusetts. — Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377.

Michigan.—Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128.

Minnesota.—Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733; State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331.

Mississippi.—State ex rel. Collins v. Senatobia Blank Book & Stationery Co. 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851.

Missouri.—State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Montana.—State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; Mills v. Stewart, 76 Mont. 429, 247 P. 332, 47 A.L.R. 424; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

Nevada.—State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

New Hampshire.—Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139.

New Jersey.—State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548 (apportionment of election districts).

New York.—Johnson v. New York, 274 N. Y. 411, 9 N. E. (2d) 30, 110 A.L.R. 1502; Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229; Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E. (2d) 22, 106 A.L.R. 1510, affirmed in 299 U. S. 515, 81 L. ed. 380, 57 S. Ct. 122, which has rehearing denied in 301 U. S.

712, 81 L. ed. 1365, 57 S. Ct. 926; People ex rel. Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909, affirmed in 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61; People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A. 1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 239 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538; Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 5 L.R.A. 559, 15 Am. St. Rep. 460, affirmed in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468.

North Carolina.—Moose v. Alexander County, 172 N. C. 419, 90 S. E. 441, Ann. Cas. 1917E, 1183; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L.R.A.(N.S.) 626.

North Dakota.—State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Ohio.—Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934; State v. Miller, 87 Ohio St. 12, 99 N. E. 1078, 44 L.R.A.(N.S.) 712, Ann. Cas. 1913E, 761; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

Pennsylvania.—Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157; Re Washington Street, 132 Pa. 257, 19 A. 219, 7 L.R.A. 193.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

South Carolina.—Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A.1917E, 925; State ex rel. Lyon v. Rhame, 92 S. C. 455, 75 S. E. 881, Ann. Cas. 1914B, 519; Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 953.

Tennessee.—Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126.

Texas.—St. Louis S. W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Ex parte Mode, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918E, 845; Ex parte Lewis, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

Utah.—Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224; State v. Holden (Holden v. Hardy) 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

Virginia.—Flory v. Smith, 145 Va. 164, 134 S. E. 360, 48 A.L.R. 654; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893.

Washington.—State v. Bonham, 93 Wash. 489, 161 P. 377, L.R.A.1917D, 996; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; Sallaske v. Fletcher, 73 Wash. 593, 132 P. 648, 47 L.R.A. (N.S.) 320, Ann. Cas. 1914D, 760; State v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78; State v. Sharpless, 31 Wash. 191, 71 P. 737, 96 Am. St. Rep. 893.

West Virginia.—Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

Wisconsin.—State ex rel. Froedtert Grain & Malting Co. v. Tax Commission, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

Annotation: 1 Ann. Cas. 570; Ann. Cas. 1916A, 1161.

Where a law is not arbitrary or discriminatory, the courts cannot deal with the wisdom of the legislative policy or with the adequacy or practicability of the law enacted to forward it. Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

The general principle that courts do not sit in judgment on the wisdom of legislative or constitutional enactments is especially true of Federal courts when they are asked to interpose in a controversy between a state and its citizens. Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 S. Ct. 95.

Whether legislation designed to relieve in an economic emergency is wise or unwise as a matter of policy is a question with which the court is not concerned. Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481.

The wisdom of the economic policy declared by a statute is not a question for the courts. Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476.

The court is not concerned with the wisdom embraced in a particular statute, especially in so far as it may include a general scheme for regulation of business. State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

A tax law is not rendered invalid by the fact that a better taxing system might be conceived. Salomon v. State Tax Commission, 278 U. S. 484, 73 L. ed. 464, 49 S. Ct. 192.

Whether the plan of insurance provided by the State Fire and Tornado Fund Law is adequate or inadequate, safe or unsafe, is a matter for legislative, and not for judicial, determination. Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 963, 45 A.L.R. 1337.

Whether or not a statute providing for capital punishment is wise or unwise cannot be considered by the courts. State v. Olander, 193 Iowa, 1379, 186 N. W. 53, 29 A.L.R. 306.

It is not within the province of the courts to inquire into or question the wisdom of Congress in enacting statutes restricting the issue of search warrants for private residences and providing for the punishment of officers making illegal searches of private residences, even though the result of such legislation is greatly to hamper and embarrass prohibition enforcement officers. De Pater v. United States (C. C. A. 4th) 34 F. (2d) 275, 74 A.L.R. 1413.

[18] Cincinnati Soap Co. v. United States, 301 U. S. 308, 81 L. ed. 1122, 57 S. Ct. 764; James Everard's Breweries v. Day, 265 U.

been said, the courts do not sit to review the wisdom of legislative acts.[19] It is not for the court to decide whether a law is needed and advisable in the general government of the people.[20] Where the legislative purpose has been declared in plain and unmistakable language, it is not within the province of the court to interpose contrary views of what the public need demands, although as individuals the members of the court may hold convictions contrary to those of the legislature.[1]

The basic principle already mentioned[2] applies here with full force. The constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the Constitution. The only question for the courts to decide is one of power, not of expediency or wisdom;[3] and statutes will not be

S. 545, 68 L. ed. 1174, 44 S. Ct. 628; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; New York, C. & H. R. R. Co. v. Price (C. C. A. 1st) 159 F. 330, 16 L.R.A.(N.S.) 1103; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A. 1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851; Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404, 28 A.L.R. 295; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Ashton-Jenkins Co. v. Bramel, 56 Utah, 587, 192 P. 375, 11 A.L.R. 752; State v. Holden (Holden v. Hardy) 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

If certain means to carry into effect any of the powers expressly given by the Constitution to the government of the Union constitute an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

With respect to the appraisement of economic conditions and determinations of questions of fact the existence of which makes legislation desirable, the decision of Congress is final. Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 497, 95 A.L.R. 1352.

The choice of means adopted by Congress to protect the election of President and Vice-president from corruption presents a question primarily addressed to its judgment; and if it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained are matters for congressional determination alone. Burroughs v. United States, 290 U. S. 534, 78 L. ed. 484, 54 S. Ct. 287.

The courts will not undertake to determine whether the particular structures proposed for damming a river in the exercise of the Federal power to improve navigation are reasonably necessary. Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[19] Freadrich v. State, 89 Neb. 343, 131 N. W. 618, 34 L.R.A.(N.S.) 650; Campbell v. New York, 244 N. Y. 317, 155 N. E. 628, 50 A.L.R. 1473; State v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010.

Annotation: 12 Am. St. Rep. 827.

[20] State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851.

[1] Wait v. Pierce, 191 Wis. 202, 209 N. W. 475, 210 N. W. 822, 48 A.L.R. 276.

[2] See supra, §§ 134, 135.

[3] Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 S. Ct. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 S. Ct. 163; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 S. Ct. 190; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 S. Ct. 240; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, Ann. Cas. 1918A, 583; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Tilly v. Mitchell & L. Co. 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

It is enough if the legislation is passed in the exercise of a power of government and has relation to that power. La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160.

When means adopted by Congress for carrying into effect a constitutional provision are not prohibited or are calculated

declared void simply because, in the opinion of the court, they are unwise.[4] For protection against unwise legislation within the limits of recognized legislative power, the people must look to the polls and not to the courts.[5]

It is very important to discern constantly that the scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether an enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.[6] The sole duty of the courts is to expound the law, and not to determine what it should be.[7]

§ 139. Public Policy.—It is generally recognized that the public policy of a state is to be found in its Constitution and statutes.[8] Only in the absence of

to effect the object intrusted to it, the Supreme Court of the United States will not inquire into the degree of their necessity or the wisdom of the legislation. James Everard's Breweries v. Day, 265 U. S. 545, 68 L. ed. 1174, 44 S. Ct. 628.

[4] Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Polzin v. Rand, McN. & Co. 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Farmville v. Walker, 101 Va. 323, 43 S. E. 558, 61 L.R.A. 125, 99 Am. St. Rep. 870.

[5] Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143. See also the dissenting opinion of Stone, J., in United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

[6] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Heisler v. Thomas Colliery Co. 274 Pa. 448, 118 A. 394, 24 A.L.R. 1215, affirmed in 260 U. S. 245, 67 L. ed. 237, 43 S. Ct. 83; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157.

[7] United States v. First Nat. Bank, 234 U. S. 245, 58 L. ed. 1298, 34 S. Ct. 846; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 S. Ct. 171; The Lottawanna (Road v. Heartt) 21 Wall. (U. S.) 558, 22 L. ed. 654; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. ed. 627; Walsh v. State, 33 Del. 514, 139 A. 257, 56 A.L.R. 310; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917.

As to the nature of the difference between legislative and judicial powers generally, see infra, § 204.

[8] Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185) citing R. C. L.; Boise-Payette Lumber Co. v. Challis Independent School Dist. 46 Idaho, 403, 268 P. 26, citing R. C. L.; John Griffiths & Son Co. v. National Fireproofing Co. 310 Ill. 331, 141 N. E. 739, 38 A.L.R. 559; People ex rel. Watseka Teleph. Co. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; Collins v. Metropolitan L. Ins. Co. 232 Ill. 37, 83 N. E. 542, 14 L.R.A.(N.S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129; State ex rel. St. Louis v. Public Serv. Commission, 335 Mo. 448, 73 S. W. (2d) 393, citing R. C. L.; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Dunlap v. Dunlap, 84 N. H. 352, 150 A. 905, 71 A.L.R. 1055; Spead v. Tomlinson, 73 N. H. 46, 59 A. 376, 68 A.L.R. 432; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 51 N. E. 257, 68 Am. St. Rep. 736; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Bohn v. Salt Lake City, 79 Utah, 121, 8 P. (2d) 591, 81 A.L.R. 215; La Bowe v. Balthazor, 180 Wis. 419, 193 N. W. 244, 32 A.L.R. 862.

The Supreme Court can know nothing of public policy except from the Constitution and the laws and the course of administration and decision, and while there are cases in which arguments drawn from public policy must have large influence, these are cases in which the course of legislation leaves no doubt upon the question of what the public policy is and in which what would otherwise be obscure may be cleared by reference to what is already received and established. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

The laws and policy of a state may be framed and shaped to suit its condition of climate and soil. Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289.

The public policy of the state is determined by the Constitution so far as jury trials are concerned, and the legislature is not permitted to circumvent the constitutional provision in order to secure even a

any declaration in these instruments may it be determined from judicial decisions.[9] The Supreme Court has pointed out the limitations both of judicial declaration of public policy and of the application of the theory, stating that the theory of public policy embodies a doctrine of vague and variable quality and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.[10]

In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to,[11] because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned.[12] With the foregoing considerations

better public policy. That can only be done by constitutional amendment. Labowe v. Balthazor, 180 Wis. 419, 193 N. W. 244, 32 A.L.R. 862.

For general discussions of public policy see CONFLICT OF LAWS, see supra, p. 411, § 125; CONTRACTS, Vol. 12, Subd. IV.

9 Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185) citing R. C. L.; John Griffiths & Son Co. v. National Fireproofing Co. 310 Ill. 331, 141 N. E. 739, 38 A.L.R. 559; People ex rel. Watseka Teleph. Corp. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; State ex rel. St. Louis v. Public Serv. Commission, 335 Mo. 448, 73 S. W. (2d) 393, citing R. C. L.; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Picket Pub. Co. v. Carbon County, 36 Mont. 188, 92 P. 524, 13 L.R.A.(N.S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986; Dunlap v. Dunlap, 84 N. H. 352, 150 A. 905, 71 A.L.R. 1055; Spead v. Tomlinson, 73 N. H. 46, 59 A. 376, 68 A.L.R. 432; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Bohn v. Salt Lake City, 79 Utah, 121, 8 P. (2d) 591, 81 A.L.R. 215.

The public policy of a state is to be found in its Constitution and statutes, and where these are silent, in its judicial decisions. John Griffiths & Son Co. v. National Fireproofing Co. 310 Ill. 331, 141 N. E. 739, 38 A.L.R. 559.

No act or transaction should be held to be void as against public policy unless it contravenes some positive well-defined expression of the settled will of the people of the state or nation as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law as to what they themselves believe to be the demands or interests of the public. Re Rahn, 316 Mo. 498, 291 S. W. 120, 51 A.L.R. 877.

10 Patton v. United States, 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263.

11 Twin City Pine Line Co. v. Harding Glass Co. 283 U. S. 353, 75 L. ed. 1112, 51 S. Ct. 476, 83 A.L.R. 1168; Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; State v. Surety Finance Co. 42 Ariz. 42, 21 P. (2d) 929, citing R. C. L.; People ex rel. Watseka Teleph. Corp. v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636; Raisor v. Chicago & A. R. Co. 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Dunlap v. Dunlap, 84 N. H. 352, 150 A. 905, 71 A.L.R. 1055; Spead v. Tomlinson, 73 N. H. 46, 59 A. 376, 68 A.L.R. 432; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; Wheeler v. Walter J. Bryson Co. 162 Tenn. 163, 35 S. W. (2d) 391, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Bohn v. Salt Lake City, 79 Utah, 121, 8 P. (2d) 591, 81 A.L.R. 215.

"When the legislature passes a constitutional law, that law establishes public policy upon the subjects covered by it, and that policy is not open to question by the courts." Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B. 104.

Courts are not at liberty to entertain any discussions in relation to the policy of the government except so far as that policy is brought judicially to their notice in the positive enactments and declared will of the legislature. The Star, 3 Wheat. (U. S.) 78, 4 L. ed. 338.

12 Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; Johnson v. United States (C. C. A. 1st) 163 F. 30, 18 L.R.A.(N.S.) 1194; Ex parte Birmingham, 199 Ala. 9, 74 So. 53, citing R. C. L.; Denson v. Alabama Fuel & Iron Co. 198 Ala. 383, 73 So. 525, citing R. C. L.; State v. Surety Finance Co. 42 Ariz. 42, 21 P. (2d) 929, citing R. C. L.; Colorado Wheat Growers Asso. v. Thede, 80 Colo. 529, 253 P. 30, citing R. C. L.; McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Park Comrs. v. Diamond Ice Co. 130 Iowa, 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103, 8 Ann. Cas. 28; Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Com. v. Hazel, 155 Ky. 30, 159 S. W. 673, 47 L.R.A.(N.S.) 1078; Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, 42 L.R.A.(N.S.) 1060; Belfast v. Belfast Water Co. 115 Me. 234, 98 A. 738, L.R.A. 1917B, 908; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; State v. Sunapee Dam Co. 70 N. H. 458, 50 A. 108, 59 L.R.A. 55; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156,

as its basis, the rule has become securely settled that all questions of policy are for the determination of the legislature,[13] and not for the courts.[14] In

Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97; Wheeler v. Walter J. Bryson Co. 162 Tenn. 163, 35 S. W. (2d) 391, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; State Road Comrs. v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.

13 Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1428, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Livingston County v. Darlington, 101 U. S. 407, 25 L. ed. 1015; Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185) citing R. C. L.; Cowart v. Union Paving Co. 216 Cal. 375, 14 P. (2d) 764, 83 A.L.R. 1185; Chicago, B. & Q. R. Co. v. Provolt, 42 Colo. 103, 93 P. 1126, 16 L.R.A.(N.S.) 587; Keefe v. People, 37 Colo. 317, 87 P. 791, 8 L.R.A. (N.S.) 131; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; McAllister v. Fair, 72 Kan. 533, 84 P. 112, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973; Workmen's Compensation Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; State ex rel. St. Louis v. Public Serv. Commission, 335 Mo. 448, 73 S. W. (2d) 393, citing R. C. L.; State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583; Sinclair v. Lincoln, 101 Neb. 163, 162 N. W. 488, L.R.A.1917E, 842; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L.R.A.(N.S.) 1012, affirmed in 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34; Com. v. Hall, 291 Pa. 341, 140 A. 626, 58 A.L.R. 1023; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Scibilia v. Philadelphia, 279 Pa. 549, 124 A. 273, 32 A.L.R. 981; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977; Cooper v. Nolan, 159 Tenn. 379, 19 S. W. (2d) 274, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L.R.A. 589; Ex parte Allison, 48 Tex. Crim. Rep. 634, 90 S. W. 492, 3 L.R.A.(N.S.) 622, 13 Ann. Cas. 684; Smoot v. People's Perpetual Loan & Bldg. Asso. 95 Va. 686, 29 S. E. 746, 41 L.R.A. 589; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

The judicial province is construction only; the policy of the law is the prerogative of the legislative department. United States v. Jones, 131 U. S. 1, 33 L. ed. 90, 9 S. Ct. 669.

14 **United States.**—Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Williams v. Baltimore, 289 U. S. 36, 77 L. ed. 1015, 53 S. Ct. 431; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Dewey v. United States, 178 U. S. 510, 44 L. ed. 1170, 20 S. Ct. 981; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 S. Ct. 190; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Nichol v. Levy, 5 Wall. 433, 18 L. ed. 596; Scott v. Sanford, 19 How. 393, 15 L. ed. 691; Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 287 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185) citing R. C. L.

Alabama.—Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.

Arizona.—Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 649, 58 L.R.A. 921, 91 Am. St. Rep. 100.

California.—Cowart v. Union Paving Co. 216 Cal. 375, 14 P. (2d) 764, 83 A.L.R. 1185; Re Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A. (N.S.) 1092, 11 Ann. Cas. 911.

Colorado.—People ex rel. Arkansas Valley Sugar Beet & Irrig. Land Co. v. Burke, 72 Colo. 486, 212 P. 837, 30 A.L.R. 1085.

Connecticut.—Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

Florida.—State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746, 89 A.L.R. 946; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965.

Illinois.—Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; Raisor v. Chicago & A. R. Co. 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229.

Indiana.—Blue v. State, 206 Ind. 98, 188 N. E. 583, 91 A.L.R. 334; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

Iowa.—Park Comrs. v. Diamond Ice Co. 130 Iowa, 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103, 8 Ann. Cas. 28.

Kansas.—McAllister v. Fair, 72 Kan. 533, 84 P. 112, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973.

Maine.—Farren v. Maine C. R. Co. 112 Me. 81, 90 A. 497, 52 L.R.A.(N.S.) 203.

Massachusetts. — Nicholls v. Lynn, — Mass. —, 7 N. E. 577, 110 A.L.R. 377.

Minnesota. — Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733;

accordance with these general principles, it has been said that if a state Constitution authorizes a grant, through legislative action, of an exclusive privilege, it must be deemed to be in accord with the policy of the state.[15]

Not only is there no public policy which prohibits the legislature from doing anything which the Constitution does not prohibit,[16] but a statute is conclusive as to the public policy of the state unless it contravenes constitutional provisions.[17] Hence, the courts are not at liberty to declare a law void as in violation of public policy.[18]

Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450.

Mississippi.—Mahorner v. Hooe, 9 Smedes & M. 247, 48 Am. Dec. 706.

Missouri.—State ex rel. St. Louis v. Public Serv. Commission, 335 Mo. 448, 73 S. W. (2d) 393, citing R. C. L.; Andrus v. Business Men's Acci. Asso. 283 Mo. 442, 223 S. W. 70, 13 A.L.R. 779.

Montana.—Re Wilson, 102 Mont. 178, 56 P. (2d) 733, 105 A.L.R. 367; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 533.

Nebraska.—Sinclair v. Lincoln, 101 Neb. 163, 162 N. W. 488, L.R.A.1917E, 842.

Nevada.—Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A.1916A, 696, Ann. Cas. 1916E, 1097.

New Jersey. — State ex rel. Morris v. Wrightson, 56 N. J. L. 126, 28 A. 56, 22 L.R.A. 548 (apportionment of election districts).

New York.—People v. Crane, 214 N. Y. 154, 108 N. E. 427, L.R.A.1916D, 550, Ann. Cas. 1915B, 1254, affirmed in 293 U. S. 195, 60 L. ed. 218, 36 S. Ct. 85; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.

North Dakota. — Northern P. R. Co. v. Richland County, 28 N. D. 172, 148 N. W. 545, L.R.A.1915A, 129, Ann. Cas. 1916E, 574.

Ohio.—Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417.

Oregon.—Herbring v. Lee, 126 Or. 588, 269 P. 236, 60 A.L.R. 1165, affirmed in 280 U. S. 111, 74 L. ed. 217, 50 S. Ct. 49, 64 A.L.R. 1430.

Pennsylvania.—Com. v. Hall, 291 Pa. 341, 140 A. 626, 58 A.L.R. 1023; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Com. ex rel. Burt v. Union League, 135 Pa. 301, 19 A. 1030, 8 L.R.A. 195, 20 Am. St. Rep. 870.

Tennessee.—Cooper v. Nolan, 159 Tenn. 379, 19 S. W. (2d) 274, citing R. C. L.; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, 42 L.R.A.(N.S.) 493, Ann. Cas. 1913D, 1306.

Utah.—Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552; Denver & R. G. R. Co. v. Grand County, 51 Utah, 294, 170 P. 74, 3 A.L.R. 1224.

Washington. — Malette v. Spokane, 77 Wash. 205, 137 P. 496, 51 L.R.A.(N.S.) 686, Ann. Cas. 1915D, 225.

West Virginia.—State Road Commission v. County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.

Wisconsin.—Wait v. Pierce, 191 Wis. 202, 209 N. W. 475, 210 N. W. 822, 48 A.L.R. 276; Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040.

The function of the courts when an act of Congress is appropriately challenged as not conforming to the constitutional mandate is merely to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and not to approve or condemn its policy. United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

A Supreme Court can announce no public policy of its own, but merely what it believes to be the public policy of the people of the commonwealth by which it is created. It has no power to create or command but merely to construe; and where the people have spoken, either in the form of a constitutional enactment or a valid and constitutional statute, it must be controlled by their decisions and conclusions. Northern P. R. Co. v. Richland County, 28 N. D. 172, 148 N. W. 545, L.R.A.1915A, 129, Ann. Cas. 1916E, 574.

[15] Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 278 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; Perkins v. Heert, 158 N. Y. 306, 53 N. E. 18, 43 L.R.A. 858, 70 Am. St. Rep. 483; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755.

[16] Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 278 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; Flowers v. Logan County, 138 Ky. 59, 127 S. W. 512, 137 Am. St. Rep. 347; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; Cooper v. Nolan, 159 Tenn. 379, 19 S. W. (2d) 274, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489; Julien v. Model Bldg. L. & Invest. Asso. 116 Wis. 79, 92 N. W. 561, 61 L.R.A. 668.

The subjects to be regulated by the legislature and the order of their regulation are within the prerogatives of the lawmaking body, and when such body has acted within the proper province, the courts cannot interfere. State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

[17] Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.

[18] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 278 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 S. Ct. 152; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957, writ of certiorari denied in 218 U. S. 673, 54 L. ed. 1205, 31 S. Ct. 223; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99;

Where courts include in their decrees their opinions on questions of public policy, they in effect make the judicial tribunals lawmaking bodies in usurpation of the powers of the legislature.[19] Although public policy and comity may be decisive in the determination of what law shall be applied in given circumstances, the judges may not recognize or deny, at their pleasure or caprice, the rights which individuals may claim under it, but the rule thus adopted, having obtained the force of law by user and acquiescence, belongs only to the political department of the state, as far as changes are concerned, whenever such changes become desirable.[20]

4. Motives behind Legislation

§ 140. Presumptions as to Motives.—A general presumption exists in favor of the good faith of all lawmaking bodies—that is, primarily the courts will assume that the lawmaking body considers the effect of legislation on the constitutional rights of citizens, that it acts from patriotic and just motives[1] with a desire to promote the public good,[2] and that laws are passed in good faith in order to remedy by proper regulations some evil not reached or corrected by previous legislation.[3]

In accordance with the principle already stated that no presumption of wrongdoing on the part of the legislature is ever indulged by the judiciary,[4]

Perkins v. Cook County, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917A, 27; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A. 1915B, 420, Ann. Cas. 1915D, 987; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Board of Park Comrs. v. Diamond Ice Co. 130 Iowa, 603, 105 N. W. 203, 3 L.R.A.(N.S.) 1103, 8 Ann. Cas. 28; Wheeler v. Weightman, 96 Kan. 50, 149 P. 977, L.R.A.1916A, 846; Drury v. Franke, 247 Ky. 758, 57 S. W. (2d) 969, 88 A.L.R. 917; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Belfast v. Belfast Water Co. 115 Me. 234, 98 A. 738, L.R.A.1917B, 908; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Picket Pub. Co. v. Carbon County, 36 Mont. 188, 92 P. 524, 13 L.R.A.(N.S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986; Worthington v. District Ct. 37 Nev. 212, 142 P. 230, L.R.A. 1916A, 696, Ann. Cas. 1916E, 1097; Rickey v. Slingerland, 143 Misc. 583, 256 N. Y. S. 901, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Cooper v. Nolan, 159 Tenn. 379, 19 S. W. (2d) 274, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A. 1918A, 1193; State v. Bowen, 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; Mallette v. Spokane, 77 Wash. 205, 137 P. 496, 51 L.R.A.(N.S.) 686, Ann. Cas. 1915D, 225; Ah Lim v. Territory, 1 Wash. 156, 24 P. 538, 9 L.R.A. 395; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489; Julien v. Model Bldg. L. & Invest. Asso. 116 Wis. 79, 92 N. W. 561, 61 L.R.A. 668.

[19] Baker v. United States (C. C. A. 1st) 27 F. (2d) 863 (writ of certiorari denied in 278 U. S. 656, 73 L. ed. 565, 49 S. Ct. 185), citing R. C. L.; Ex parte Birmingham, 199 Ala. 9, 74 So. 51, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Cooper v. Nolan, 159 Tenn. 379, 19 S. W. (2d) 274, citing R. C. L.; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; State v. Superior Ct. 67 Wash. 37, 120 P. 861, Ann. Cas. 1913D, 78; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681, 63 L.R.A. 820, 99 Am. St. Rep. 964.

[20] Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65, 89 A.L.R. 1007.

[1] Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L.R.A. 588, 86 Am. St. Rep. 306, overruled on another point in Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386; Louisville School Bd. v. King, 127 Ky. 824, 107 S. W. 247, 15 L.R.A. (N.S.) 379; People ex rel. Ellis v. Calder, 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550, affirmed in 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538; State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827; St. Louis Southwestern R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A. 1917B, 1108; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

[2] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133.

[3] State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696.

[4] See supra, § 129.

courts cannot impute to the legislative department a disregard of any fundamental principle of civil liberty;[5] nor will they impute an intention to defy or evade the Constitution.[6]

§ 141. Inquiry into Actual Motives.—One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature.[7] Thus, the

[5] Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

Nothing short of the most explicit language will induce the court to attribute to Congress the intent to authorize investigations into private papers, on the possibility that they may disclose evidence of crime, in view of the provision of the Constitution against unreasonable searches and seizures. Federal Trade Commission v. American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, 44 S. Ct. 336, 32 A.L.R. 786.

[6] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Tuberculosis Hospital Dist. v. Peter, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915C, 310.

The court will not attribute to Congress an intent, in the enactment of a statute, to defy a provision of the Constitution or to come so near doing so as to raise a serious question of constitutional law. Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143, 57 S. Ct. 816; Federal Trade Commission v. American Tobacco Co. 264 U. S. 298, 68 L. ed. 696, 44 S. Ct. 336, 32 A.L.R. 786.

It is not to be presumed that it was the intention of a state legislature in passing an act to commit a gross usurpation and encroachment upon the sovereignty of the United States. United States v. Thompson, 98 U. S. 486, 25 L. ed. 194.

A wrong intent cannot be imputed to a state legislature, but it will be assumed that it acts according to its judgment for the best interests of the state. Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 S. Ct. 176.

The Federal Supreme Court has no right to assume that a state statute, making it a felony for any person to deal in articles manufactured by a corporation the license of which has been forfeited, will be applied so as to interfere with interstate commerce. Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406.

[7] **United States.** — Sonzinsky v. United States, 300 U. S. 506, 81 L. ed. 772, 57 S. Ct. 554; Fox v. Standard Oil Co. 294 U. S. 87, 79 L. ed. 780, 55 S. Ct. 333, rehearing denied in 294 U. S. 732, 79 L. ed. 1261, 55 S. Ct. 511; A. Magnano Co. v. Hamilton, 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 73 A.L.R. 1464, 75 A.L.R. 1536; Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522; Hampton v. United States, 276 U. S. 394, 72 L. ed. 624, 43 S. Ct. 348; Smith v. Kansas City Title & T. Co. 255 U. S. 180, 65 L. ed. 577, 41 S. Ct. 243; Hamilton v. Kentucky Distilleries & W. Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Weber v. Freed, 239 U. S. 325, 60 L. ed. 308, 36 S. Ct. 131, Ann. Cas. 1916C, 317; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 S. Ct. 152; Calder v. People of Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; New Orleans v. Warner, 175 U. S. 120, 44 L. ed. 96, 20 S. Ct. 44; Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 S. Ct. 530; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 S. Ct. 91; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Ex parte McCardle, 7 Wall. 506, 19 L. ed. 264; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162.

California.—Re Wong Wing, 167 Cal. 199, 138 P. 695, 51 L.R.A.(N.S.) 361; Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A. (N.S.) 244, 20 Ann. Cas. 158; Stevenson v. Colgan, 91 Cal. 649, 27 P. 1089, 14 L.R.A. 459, 25 Am. St. Rep. 230.

Idaho.—McDonald v. Doust, 11 Idaho, 14, 81 P. 60, 69 L.R.A. 220.

Indiana. — Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A.(N.S.) 787, 120 Am. St. Rep. 386; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L.R.A. 566.

Kentucky. — Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454.

Maryland.—Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

Michigan.—Todd v. Election Comrs. 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L.R.A. 330.

Nebraska.—State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.

Nevada.—State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

New Hampshire.—Coleman v. School Dist. 87 N. H. 465, 183 A. 536, citing R. C. L.

New York.—People ex rel. Sturgis v. Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L.R.A. 419.

North Carolina.—State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L.R.A. 827; State v. Eaves, 106 N. C. 752, 11 S. E. 370, 8 L.R.A. 259.

North Dakota.—State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Oklahoma.—State ex rel. Short v. Johnson, 90 Okla. 21, 215 P. 945, citing R. C. L.

Pennsylvania.—Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Com. ex rel. Elkin v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

South Carolina.—Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958.

Tennessee.—Caldwell v. Lyon, 168 Tenn. 607, 80 S. W. (2d) 80, 100 A.L.R. 1152; Petty v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821.

motives which impel the legislature or any component part or member of it to enact a law cannot be made a subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law, even though fraud, bribery, and corruption are alleged.[8] For example, evidence as to the manner of proceeding or the agencies used by any member of the legislature in procuring an act of divorce is not admissible.[9]

The courts cannot declare a statute void in consequence of alleged improper motives which influenced certain members of the legislature that passed the law.[10] Just as bad motives of the legislators do not nullify laws passed within the bounds of the Constitution, it is well established that good motives or good faith on the part of the legislators in passing a law will be ineffective in sustaining it if it clearly violates the provisions of the Constitution.[11]

The rule is equally settled that ordinarily the courts are precluded from investigating beyond the statute itself the intention of those who enacted it.[12] If one of the aims of legislation is valid, it is not rendered invalid by the circumstance that the legislature had other purposes in view which, considered apart, it had no constitutional power to make effective.[13]

The rule as to the inapplicability of legislative motive or interest to invalidate enactments is subject to the established exception that such matters may

Utah.—State v. Bayer, 34 Utah, 257, 97 P. 129, 19 L.R.A.(N.S.) 297.

West Virginia.—State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Wisconsin.—Theis v. Durr, 125 Wis. 651, 104 N. W. 985, 1 L.R.A.(N.S.) 571, 110 Am. St. Rep. 880; Tilly v. Mitchell & L. Co. 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; State ex rel. Rose v. Superior Ct. 105 Wis. 651, 81 N. W. 1046, 48 L.R.A. 819; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L.R.A. 394.

Annotation: 81 L. ed. 772; 25 Am. St. Rep. 233; 88 Am. St. Rep. 937; 1 Ann. Cas. 570.

So long as the motive of Congress and the effect of its legislative action is to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxation cannot invalidate congressional action. J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348.

The knowledge, negligence, methods, or motives of the legislature will not be inquired into by the courts in determining the validity of a statute repealing a corporate charter, if the statute is passed in due form. Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122.

[8] United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 S. Ct. 308; Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A.(N.S.) 244, 20 Ann. Cas. 158; People v. Glenn County, 100 Cal. 419, 35 P. 302, 38 Am. St. Rep. 305; People v. Calder, 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550, affirmed in 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Com. ex rel. Elkins v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; Shenandoah Lime Co. v. Mann, 115 Va. 865, 80 S. E. 753, Ann. Cas. 1915C, 973.

Annotation: 40 L.R.A.(N.S.) 29.

The knowledge and good faith of a legislature are not open to question. A settlement which the legislature has offered cannot be challenged for fraud. United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 S. Ct. 308.

There have been pronouncements to the effect that private acts obtained by fraud may be relieved against in a court of law or equity. Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360.

An act of the legislature granting a franchise cannot be held to be void on the ground that the application therefor was fraudulent, unless the fraud is clearly proved. Derby Turnp. Co. v. Parks, 10 Conn. 522, 27 Am. Dec. 700.

[9] Jones v. Jones, 12 Pa. 350, 51 Am. Dec. 611.

[10] Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

[11] Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; People ex rel. Mooney v. Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L.R.A. 770; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.

A statute which violates the Federal Constitution is void regardless of the purpose of its recitals. Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 11 S. Ct. 213.

[12] La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; State v. Sutton, 87 N. J. L. 192, 94 A. 788, L.R.A.1917E, 1176, Ann. Cas. 1917C, 91, affirmed in 244 U. S. 258, 61 L. ed. 1117, 37 S. Ct. 508.

[13] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

be gone into by the courts to the extent that they may be disclosed on the face of acts or may be inferable from their operation.[14] Both the rules and the exception are examples of the general doctrine heretofore discussed[15] that since the purpose of a statute should be determined from the natural and legal effect of the language employed, whether it is repugnant to the Constitution must therefore be determined from its natural effect when put into operation, and not from its proclaimed purpose.[16]

The general prohibition against inquiry as to the motives of the legislators applies to acts of Congress,[17] to laws enacted by the state legislatures,[18] and to ordinances and bylaws passed by municipal corporations.[19]

I. Determination of Facts Involved

1. Legislative

§ 142. Generally.—On frequent occasions the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of statutes,[20] it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding.[1]

[14] Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417, 41 L.R.A.(N.S.) 737; State v. McKune, 215 Wis. 592, 255 N. W. 916, citing R. C. L.

Annotation: 2 A.L.R. 1343 (apportionment of election districts).

[15] See supra, §§ 101, 102.

[16] Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Giddings v. Blacker, 93 Mich. 1, 52 N. W. 944, 16 L.R.A. 402; State v. Sutton, 87 N. J. L. 192, 94 A. 788, L.R.A.1917E, 1176, Ann. Cas. 1917C, 91, affirmed in 244 U. S. 258, 61 L. ed. 1117, 37 S. Ct. 508; Randall v. Richmond & D. R. Co. 107 N. C. 748, 12 S. E. 605, 11 L.R.A. 460; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821; State v. Bayer, 34 Utah, 257, 97 P. 129, 19 L.R.A.(N.S.) 297.

[17] Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Weber v. Freed, 239 U. S. 325, 60 L. ed. 308, 36 S. Ct. 131, Ann. Cas. 1916C, 317; McCrary v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561.

[18] Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Stevenson v. Colgan, 91 Cal. 649, 27 P. 1089, 14 L.R.A. 459, 25 Am. St. Rep. 230.

Annotation: 25 Am. St. Rep. 233; 88 Am. St. Rep. 937.

[19] Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Ligare v. Chicago, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; Gardiner v. Bluffton, 173 Ind. 454, 89 N. E. 853, 90 N. E. 898, Ann. Cas. 1912A, 713; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L.R.A. (N.S.) 787, 120 Am. St. Rep. 385; Burlingame v. Thompson, 74 Kan. 393, 86 P. 449, 11 Ann. Cas. 64; State v. Davidson, 50 La. Ann. 1297, 24 So. 324, 69 Am. St. Rep. 478; Bennett v. Pulaski (Tenn.) 52 S. W. 913, 47 L.R.A. 278; Knoxville v. Bird, 12 Lea (Tenn.) 121, 47 Am. Rep. 326; Wood v. Seattle, 23 Wash. 1, 62 P. 135, 52 L.R.A. 369; Tilly v. Mitchell & L. Co. 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; State ex rel. Rose v. Superior Ct. 105 Wis. 651, 81 N. W. 1046, 48 L.R.A. 819.

Annotation: Ann. Cas. 1912A, 716.

[20] See supra, §§ 128 et seq.

[1] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A.1917E, 761, Ann. Cas. 1918B, 1032; Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 75 A. 105, 134 Am. St. Rep. 636; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A. 1915D, 538; Kuenali v. Stone, 112 Misc. 125, 182 N. Y. S. 680, citing R. C. L.; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; State v. Northern P. R. Co. 19 N. D. 45, 120 N. W. 869, 25 L.R.A. (N.S.) 1001; State v. Myers, 42 W. Va. 822, 26 S. E. 539, 35 L.R.A. 844, 57 Am. St. Rep. 887, overruled on another point in State v. Bruce, 55 W. Va. 384, 47 S. E. 146.

Generally for discussion of similar questions as to the presumptions concerning facts underlying legislative action, see supra, § 131.

[2] Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969.

[3] Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; Re Viemeister, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

[4] San Christina Invest. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A. (N.S.) 676; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198; People v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859; Stetter v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408 (legislative determination held conclusive); State ex rel. Weldon v. Thomason, 142 Tenn. 527, 221 S. W. 491, citing R. C. L. (legislative declaration of fact held to be absolutely binding).

Whether a service is a "public service" within Kentucky Const. § 3, prohibiting a grant of separate public emoluments or privileges to any set of men except for public service, is a matter for the legislative discretion, the exercise of which will not be disturbed unless abused. Bosworth v. Harp, 154 Ky. 559(157 S. W. 1084, 45 L.R.A.(N.S.) 692, Ann. Cas. 1915C, 277.

A legislative declaration of facts that are material only as the ground for enacting a rule of law—for instance, that a certain use is a public one—may not be held conclusive by the courts, but a declaration by a legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect. Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

The court must assume that the repeated re-enactment of a law originating in the colonial period was an attempt to meet present-day conditions, and not a mere continuance, through ignorance or mistake, of dead legislation. Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766.

[5] Chicago v. Shaynin, 258 Ill. 69, 101 N. E. 224, 45 L.R.A.(N.S.) 23; General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453.

The legislative determination of the facts which warrant the action of the legislative body of a municipal corporation will not be set aside or disregarded by the court, unless the legislative discretion is clearly and palpably wrong. Jardine v. Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509.

The determination of the question whether an advertising billboard is a disfigurement or a desirable addition to a community and the determination of what regulations or prohibitions within certain areas shall be prescribed are, subject to limitations, for the legislative body of the city. General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453.

The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established.[2] Under the American system of government by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the Constitution and would sanction measures opposed to a republican form of government.[3]

As a general rule it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is usually regarded as conclusive unless an abuse of discretion can be shown, and that the courts do not generally have jurisdiction or power to reopen the question or make new findings of fact.[4] The same principles have been applied in defining the function of the court in reviewing ordinances of municipal corporations.[5] Neither the reasoning, however, nor the rule apply to the acts of inferior legislative tribunals. Generally, when the power or jurisdiction of such an inferior board, body, court, or other tribunal is made to depend upon the existence of a fact, its determination of the fact is not conclusive unless declared to be so in express terms or by necessary implication. If so declared, the declaration of finding can operate to bind the citizen whose property is affected thereby only in the event that at some stage of the proceedings he is afforded an opportunity to be heard on the question. Hence, the principle which accords the great

dignity of conclusiveness to determinations of the general legislature is not only not applied in the proceedings of inferior legislative tribunals, but is distinctly inapplicable.[6]

2. Judicial

a. In General

§ 143. Generally.—The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court.[7] If, under any possible state of facts, an act would be constitutional, the courts are bound to presume that such facts exist[8] and therefore will not make a separate investigation of them[9] or attempt to decide whether the legislature has reached a correct conclusion with respect to them.[10]

Every inquiry into the constitutionality of a statute involves only a question of law without regard to how the question arises.[11] Accordingly, the validity of an enactment cannot be made to depend on the facts found on the trial of the first case involving the validity of such statute.[12] If the rule were otherwise, the trial of the main issue would necessarily be delayed until the preliminary fact on which the validity of the contested legislative act depended should be first tried and determined on testimony; and, since this testimony might be different in different cases, there would be involved an absurdity of declaring the law constitutional one day and unconstitutional the next.[13]

Under certain circumstances, questions of fact may be necessarily involved in a judicial determination as to the constitutionality of a statute, as where the validity of a law regulating the charges of a public service corporation depends on whether the rates so established amount under the particular circumstances of a case to a taking of property without due process of law.[14] Before a court can properly adjudge an act of the legislature fixing maximum rates for public service companies unconstitutional on the ground that they

[6] San Christina Invest. Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.(N.S.) 676.

[7] State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; Rider v. Cooney, 94 Mont. 295, 23 P. (2d) 261, citing R. C. L. (recognizing rule); Stavig v. Van Camp, 46 S. D. 472, 193 N. W. 731, citing R. C. L.; Corsicana Cotton Mills v. Sheppard, 123 Tex. 352, 71 S. W. (2d) 247, citing R. C. L.

[8] See supra, § 131.

[9] Conlin v. San Francisco, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am. St. Rep. 17; Kuenali v. Stone, 112 Misc. 125, 182 N. Y. S. 680, citing R. C. L.; Corsicana Cotton Mills v. Sheppard, 123 Tex. 352, 71 S. W. (2d) 247, citing R. C. L.; Barker v. State Fish Commission, 88 Wash. 73, 152 P. 537, Ann. Cas. 1917D, 810.

Annotation: 37 Am. St. Rep. 23.

[10] Re Viemeister, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; Kuenali v. Stone, 112 Misc. 125, 182 N. Y. S. 680, citing R. C. L.; Corsicana Cotton Mills v. Sheppard, 123 Tex. 352, 71 S. W. (2d) 247, citing R. C. L.

[11] People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; Prescott v. Memphis, 154 Tenn. 462, 285 S. W. 587, 48 A.L.R. 1378.

"It would be a dangerous rule to declare that the validity or invalidity of an act of the legislature can be the subject of collateral attack as to the facts upon which the legislature has acted; that is, that a jury may determine from evidence adduced before it, or from lack of evidence, that an act is or is not invalid, with as many varying conclusions as there might be bodies of triers, or upon such facts as ingenuity might suggest, as matters of opinion or actual facts in evidence." Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458, in which case it was held that evidence is not admissible to show that a statute requiring caboose cars to be of a certain length and to be mounted on certain running gear is unreasonable because cars corresponding to those specified are not required for safety, and therefore that the statute which places additional expense on railroad companies is void as taking property without due process of law.

[12] Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112.

[13] State v. Lavton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487.

[14] Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; Rider v. Cooney, 94 Mont. 295, 23 P. (2d) 261, citing R. C. L.

are unreasonable and confiscatory, it should be fully informed as to all the essential facts.[15] Instances in which a determination of the facts in particular cases may be involved in testing the validity of a statute may be found in cases other than those involving the regulation of rates. Thus, proof of extrinsic facts was held to be admissible to show the actual effect of a statute which directed payment of public moneys to a school, it thereby becoming manifest that the school was owned or controlled by a religious corporation, thus bringing the case within a prohibition contained in the state Constitution.[16] It has also been announced by the Supreme Court of the United States that where an objection is made that a grand jury has been so made up as to exclude persons of the race of the accused from serving on it, it is essential to aver and prove such fact so as to establish this contention.[17] In such cases the general rule seems to be that where a party seeks to question the constitutionality of a statute upon a ground which involves a question of fact, he must in some appropriate way raise it in the trial court and present the testimony upon which he relies to establish such fact.[18]

§ 144. Judicial Review of Legislative Determination as to Facts.—Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature,[19] the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous,[20] arbitrary, or wholly unwarranted.[1]

Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, its findings are not subject to judicial review.[2] Thus, the legislature

[15] Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 S. Ct. 400; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396.

Annotation: L.R.A.1915D, 458.

This subject is discussed generally in Carriers, Vol. 9, p. 512, § 119.

[16] Cook County v. Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 1 L.R.A. 437, 8 Am. St. Rep. 386.

[17] Franklin v. South Carolina, 218 U. S. 161, 54 L. ed. 980, 30 S. Ct. 640; Martin v. Texas, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338.

[18] Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927 (no allegation and proof of facts which would establish invalidity in this particular situation); Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313, 10 Ann. Cas. 1108.

As to the court in which to raise constitutional questions generally, see supra, § 88.

As to pleading and method of raising questions of validity, see supra, § 126.

[19] See supra, § 142.

[20] Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; Bosworth v. Harp, 154 Ky. 559, 157 S. W. 1084, 45 L.R.A.(N.S.) 692, Ann. Cas. 1915C, 277; Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Acci. & P. G. Ins. Co. 111 Md. 561, 75 A. 105, 134 Am. St. Rep. 636; Smith v. Command, 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; State ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150, L.R.A.1917B, 710; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Poulnot v. Cantwell, 129 S. C. 171, 123 S. E. 651, citing R. C. L.

Appellate courts are slow to declare that a state legislature is wrong in its facts where the courts have inadequate knowledge of local conditions. Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151.

The court cannot interfere with a provision for sterilization of feeble-minded persons, on the ground that the probability of transmission of such quality cannot be determined with reasonable certainty, unless it is convinced of such fact beyond a reasonable doubt. Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

[1] McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508.

[2] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352, affirming 265 N. Y. 37, 191 N. E. 726, 92 A.L.R. 1523; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 S. Ct. 122; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; People v. Price, 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A, 1154; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; Viemeis-

is the proper authority to determine what should and what should not constitute a public burden, and with the exercise of its discretion in such matters the courts are loath to interfere.[3] Moreover, with respect to the appraisement of economic conditions and determinations of questions of fact, the existence of which makes legislation desirable, the decision of Congress is final.[4] There is no right to a trial by jury as to facts within the scope of legislative determination.[5]

In cases involving the validity of legislation the courts have no power to determine the merits of conflicting theories,[6] to conduct an investigation of facts which may enter into questions of public policy or expediency, or to sustain or frustrate the legislation according to whether the courts happen to approve or disapprove of the determination of such questions of fact by the legislature.[7] This principle has been applied to statutes relating to various subjects, such as the mode of executing death sentences,[8] the declaration of emergencies,[9] the inheritable tendency to mental defectiveness,[10] the testing of milch cows with tuberculin,[11] and the compulsory vaccination of school children.[12]

With reference, however, to a legislative determination and declaration of the existence of an emergency, the view now prevalent is that such a question is primarily for the legislature to determine[13] and that although the legislative determination is entitled to great respect, it is not conclusive[14] because the

ter v. White, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408.

Annotation: Ann. Cas. 1914A, 1157.

Where the constitutional validity of a statute depends upon the existence of facts, the courts cannot, where the question of what the facts establish is a fairly debatable one, set up their opinions with respect to it against the opinion of the legislature. Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325.

[3] Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166.

[4] Norman v. Baltimore & O. R. Co. 294 U. S. 240, 79 L. ed. 885, 55 S. Ct. 407, 95 A.L.R. 1352.

[5] Sisson v. Buena Vista County, 128 Iowa, 442, 104 N. W. 454, 70 L.R.A. 440.

[6] McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260.

[7] Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; Woodall v. Darst, 71 W. Va. 350, 77 S. E. 264, 80 S. E. 367, 44 L.R.A.(N.S.) 83, Ann. Cas. 1914B, 1278.

[8] People v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859.

[9] State ex rel. Asotsky v. Regan, 317 Mo. 1216, 298 S. W. 747, 55 A.L.R. 773; State ex rel. Schorr v. Kennedy, 132 Ohio St. 510, 9 N. E. (2d) 278, 110 A.L.R. 1428.

Annotation: 7 A.L.R. 522, s. 110 A.L.R. 1438 (statute); 55 A.L.R. 779 (ordinance).

As to application of the text principle to prevent the operation of referendum on statutes purporting to be passed under a declared legislative emergency, see INITIATIVE, REFERENDUM, AND RECALL.

For discussion of the effect of legislative declaration of emergency upon the time when statutes go into effect, see STATUTES [Also 25 R. C. L. p. 801, § 50].

[10] Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

[11] Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; Adams v. Milwaukee, 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066.

See also FOOD [Also 11 R. C. L. p. 1112, § 19].

[12] Blue v. Beach, 155 Ind. 121, 58 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195.

Annotation: L.R.A.1915D, 459.

As to compulsory vaccination of school children, see HEALTH [Also 12 R. C. L. p. 1273, § 12].

[13] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[14] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N. E. 145, 71 A.L.R. 1327; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

Annotation: 7 A.L.R. 520, s. 110 A.L.R. 1436.

courts possess the final authority to determine whether an emergency in fact exists.[15]

b. JUDICIAL NOTICE

§ 145. As to Facts Involved in Constitutionality of Statutes.—The general rule is that in passing on the constitutionality of a statute, courts will take judicial notice of all facts relevant to the question as to its validity,[16] bringing to their assistance such scientific, economic, physical, and other pertinent facts as are matters of common knowledge.[17]

The rule stated in many of the cases is that in determining the validity of a statute, courts will treat the question as one of law, resort being had to extrinsic considerations only to the extent that the facts are, or may become, a matter of judicial knowledge.[18] In the application of the constitutional limitation of reasonableness in the exercise of the police power,[19] courts may and do determine from an inspection of the provisions of a statute under consideration whether it properly relates to matters within the limits of the police power.[20] In the exercise of this revisory power, however, they are often held to be limited to a consideration of the language of the statute itself and to such facts as may be noticed judicially.[1] Consequently, it is usually stated that they cannot consider evidence aliunde to show the invalidity of the statute.[2]

[15] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[16] State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. Rep. 571.

[17] Mallette v. Spokane, 77 Wash. 205, 137 P. 496, 51 L.R.A.(N.S.) 686, Ann. Cas. 1915D, 225.

The courts will decline to take judicial knowledge that a statutory requirement that seeds should be marked with the locality where grown is impracticable. State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158.

[18] McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; Pittsburgh, C. C. & St. L. R. Co. v. Hartford, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461.

[19] See infra, §§ 302 et seq.

[20] People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L.R.A.(N.S.) 928; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

See also infra, §§ 303, 305.

[1] Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804; Conlin v. San Francisco, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am. St. Rep. 17; McFadden v. Blocker, 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; State v. Bridgeman & R. Co. 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913D, 41; Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; McIntosh v. Johnson, 211 N. Y. 265, 105 N. E. 414, L.R.A.1915D, 603; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439; People ex rel. Kemmler v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859; State ex rel. Maxwell v. Kent-Coffey Mfg. Co. 204 N. C. 365, 168 S. E. 397, 90 A.L.R. 476, affirmed in 291 U. S. 642, 78 L. ed. 1040, 54 S. Ct. 437; State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L.R.A. 317; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

Annotation: 37 Am. St. Rep. 23.

A court, in passing upon an ordinance of a regulatory nature as to whether it is reasonable and will tend to promote the public health, morals, safety, or welfare, can take judicial notice of the changing conditions in manner of living and matters of common knowledge. Walcher v. First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593.

For a general discussion of facts of which the court may take judicial cognizance, see EVIDENCE [Also JUDICIAL NOTICE, 15 R. C. L. pp. 1054 et seq.]

[2] Stevenson v. Colgan, 91 Cal. 649, 27 P. 1089, 14 L.R.A. 459, 25 Am. St. Rep. 230; People v. Price, 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A, 1154, affirmed in 238 U. S. 446, 59 L. ed. 1400, 35 S. Ct. 892; People v. Flerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A. (N.S.) 893; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L.R.A. 853, 62 Am. St. Rep. 715; People ex rel. Kemmler v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859; Shelby v. Cleve-

The principle limiting examination of such matters to those which may be judicially noticed is not of universal application. In view of the paramount consideration that constitutional rights are entitled to protection, it has been stated that there is no general principle of law that the courts, in considering the validity of a statute, are limited to facts of which they may take judicial notice. No general rule can be pointed out, however, stating in which cases the courts will take evidence and in which they will limit their inquiry to facts judicially noticed.[3] Thus, some courts have recognized that exceptions may exist, stating that although the rule is laid down that the courts cannot hear evidence touching the constitutionality of a statute, but must determine its validity from the matters appearing on its face and matters of which the court can take judicial notice, there may be some seeming exceptions to this rule.[4] Another court, without deliberating the point in considering the question as to how far the court should go in ascertaining the reasonableness of a police measure, has held that in the consideration of the question of the constitutionality of a statute providing for destruction of trees which are hosts to fruit pests, evidence is admissible of circumstances showing the life history of the pest, the position occupied by the trees in question in the perpetuation of the pest, the proximity of the trees to orchards, and the menace to the fruit industry of the state to enable the court to ascertain the validity of the statute where it is assailed on the ground that its enactment is not in the legitimate exercise of the police power.[5] Moreover, the Supreme Court has stated quite broadly that the invalidity of a statute may be shown by things which will be judicially noticed or by facts established by evidence.[6]

In those cases where facts are judicially noticed, since testimony is inadmissible to overthrow facts as to which courts may take judicial notice,[7] expert or other witnesses cannot be allowed to testify that in carrying out a law some provision of the Constitution may possibly be violated.[8]

§ 146. As to Public Opinion.—In view of the refusal of the courts, in passing on the constitutionality of statutes, either to review generally legislative findings as to facts essential to their validity[9] or to institute investigations de novo as to such facts,[10] a practical limitation on the power of the legislature to determine questions of fact has been established through the right of judicial tribunals within certain limits to take judicial notice of matters of fact. While refusing to decide whether the legislature has correctly determined which of two conflicting theories is sustained by the actual facts, the courts frequently take judicial notice that the decision of the legislature is in ac-

land Mill & Power Co. 155 N. C. 196, 71 S. E. 218, 35 L.R.A.(N.S.) 488, Ann. Cas. 1912C, 179.
Annotation: 14 L.R.A. 459, s. L.R.A. 1915D, 458 et seq.

3 Annotation: L.R.A.1915D, 459.

4 Barker v. State Fish Commission, 88 Wash. 73, 152 P. 537, Ann. Cas. 1917D, 810.

5 Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

6 Weaver v. Palmer Bros. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320, distinguishing Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257 (Weaver Case involved state police measure regulating the manufacture, sterilization, and sale of bedding).
The court in determining the reasonableness of a police measure may, like the legislative body enacting the measure, consider the general circumstances and conditions so far as they are matters of judicial knowledge, are admitted, or are shown by satisfactory evidence. Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804.

7 Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893.
See generally EVIDENCE [Also JUDICIAL NOTICE, 15 R. C. L. p. 1063, § 5].

8 People v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L.R.A. 715, 16 Am. St. Rep. 859.
Annotation: L.R.A.1915D, 459.

9 See supra, § 144.

10 See supra, § 143.

cordance with the prevalent public opinion.[11] On reaching this conclusion, the legislation may be upheld as having a reasonable basis in fact. In so doing, the courts do not recognize that constitutional questions may be settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations on legislative action and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable and the extent of a special constitutional limitation is affected by the truth with respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration.[12] A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted on without proof by the legislature and the courts. The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong and that science may yet show it to be wrong is not conclusive.[13] This is well illustrated by Sir Matthew Hale's charge to the jury in a trial for witchcraft in 1665 (6 How. St. Tr. 700) to the effect "that there were such creatures as witches he made no doubt at all; for, first, the Scriptures had affirmed so much; secondly, the wisdom of all nations had provided laws against such persons."

§ 147. —Illustrations.—There are many specific examples of the general principle that courts take judicial notice of all relevant facts in ascertaining the validity of legislation.[14] Included are such matters as the unhealthfulness of mining occupations,[15] the differences which place women at disadvantages in comparison with men while engaged in labor,[16] the general use of particular kinds of appliances by railroad companies,[17] and the fact that not all the surviving soldiers and sailors of the Civil War and their immediate relatives are in indigent circumstances.[18] In passing on the validity of laws regulating the conditions of employment, courts have noticed the fact that more than half of the states have enacted laws on the same subject.[19]

J. Effect of Unconstitutional Statutes

1. In General

§ 148. Generally.—The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law,[20] but is wholly

11 Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

12 Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A. 1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214.

13 Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819, wherein it was said in reference to a statute regulating the making of small loans that it is a matter of common knowledge that such loans are usually made to persons of small means, who, by reason of their actual or supposed necessities, are compelled to deal with, and yield to, the demands of those engaged in that business.

14 See supra, § 145.

15 Ex parte Kair, 28 Nev. 127, 80 P. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893.
See LABOR [Also 16 R. C. L. p. 489, § 62].

16 W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994.
For a detailed treatment of this question, see LABOR [Also 16 R. C. L. p. 485, § 60].

17 People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626.

18 Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946.

19 People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893.

20 Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 S. Ct. 1120; Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469; Norton v. Shelby County, 118

void,[1] and in legal contemplation is as inoperative as if it had never been passed.[2] Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.[3] Moreover, a construction of a statute which brings it in conflict with the Constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith.[4]

Since an unconstitutional law is void, the general principles follow that it imposes no duties,[5] confers no rights,[6] creates no office,[7] bestows no power or

U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 S. Ct. 734; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Texas Co. v. State, 31 Ariz. 485, 254 P. 1060, 53 A.L.R. 258; Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373; Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238, writ of certiorari denied in 254 U. S. 640, 65 L. ed. 452, 41 S. Ct. 13; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; Opinion of Justices, 269 Mass. 611, 168 N. E. 536, 66 A.L.R. 1477; Garden of Eden Drainage Dist. v. Bartlett Trust Co. 330 Mo. 554, 50 S. W. (2d) 627, 84 A.L.R. 1078; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964; Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105; Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; Miller v. State Entomologist (Miller v. Schoene) 146 Va. 175, 135 S. E. 813, 67 A.L.R. 197, affirmed in 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

Annotation: 3 Ann. Cas. 581.

A discriminatory law is, equally with the other laws offensive to the Constitution, no law at all. Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

[1] Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 S. Ct. 734; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257; State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Henderson v. Lieber, 175 Ky. 15, 192 S. W. 830, 9 A.L.R. 620; Opinion of Justices, 269 Mass. 611, 168 N. E. 536, 66 A.L.R. 1477; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; Garden of Eden Drainage Dist. v. Bartlett Trust Co. 330 Mo. 554, 50 S. W. (2d) 627, 84 A.L.R. 1078; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; State v. Tufly, 20 Nev. 427, 22 P. 1054, 19 Am. St. Rep. 374; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105; Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; Miller v. State Entomologist (Miller v. Schoene) 146 Va. 175, 135 S. E. 813, 67 A.L.R. 197, affirmed in 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955.

Annotation: 22 Am. St. Rep. 649.

[2] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Texas Co. v. State, 31 Ariz. 485, 254 P. 1060, 53 A.L.R. 258; Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238, writ of certiorari denied in 254 U. S. 640, 65 L. ed. 452, 41 S. Ct. 13; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; Cooke v. Iverson, 108 Minn. 388, 122 N. W. 251, 52 L.R.A.(N.S.) 415; Clark v. Grand Lodge, B. R. T. 328 Mo. 1084, 43 S. W. (2d) 404, 88 A.L.R. 150; St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

[3] Clark v. Grand Lodge, B. R. T. 328 Mo. 1084, 43 S. W. (2d) 404, 88 A.L.R. 150.

[4] Gilkeson v. Missouri P. R. Co. 222 Mo. 173, 121 S. W. 138, 24 L.R.A.(N.S.) 844, 17 Ann. Cas. 763; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408.

[5] Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834.

[6] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238, writ of certiorari denied in 254 U. S. 640

authority on anyone,[8] affords no protection,[9] and justifies no acts performed under it.[10] No one is bound to obey an unconstitutional law[11] and no courts are bound to enforce it[12] because only the valid legislative intent becomes the law to be enforced by the courts.[13]

A void act cannot be legally inconsistent with a valid one.[14] Moreover, an unconstitutional law cannot operate to supersede any existing valid law.[15] Accordingly, where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law.[16] A judgment of any court which is based on an unconstitutional law—it has been said—has no legitimate basis at all and is not to be treated as a judgment of a competent tribunal.[17] Furthermore, courts of other states are not required to give to it the full faith and credit commanded by the provisions of the United States Constitution as to the public acts, records, and judicial proceedings of other states.[18]

A contract which rests on an unconstitutional statute is void[19] and creates no obligation to be impaired by subsequent legislation.[20]

These general principles apply to the Constitutions as well as to the laws of the several states in so far as they are repugnant to the Constitution and laws of the United States.[1]

65 L. ed. 452, 41 S. Ct. 13; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; Garden of Eden Drainage Dist. v. Bartlett Trust Co. 330 Mo. 554, 50 S. W. (2d) 627, 84 A.L.R. 1078; St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; Henry County v. Standard Oil Co. 167 Tenn. 485, 71 S. W. (2d) 683, 93 A.L.R. 1483.

[7] Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486.

[8] Felix v. Wallace County, 62 Kan. 832, 62 P. 667, 84 Am. St. Rep. 424; Henderson v. Lieber, 175 Ky. 15, 192 S. W. 830, 9 A.L.R. 620; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion).

[9] Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469; Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 6 S. Ct. 1121; Highway Comrs. v. Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion); Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; State v. Candland, 36 Utah, 406, 104 P. 285, 140 Am. St. Rep. 834; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

The text statement is very general. For detailed treatment, see infra, § 149.

[10] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[11] State ex rel. Clinton Falls Nursery Co. v. Steele County, 181 Minn. 427, 232 N. W. 737, 71 A.L.R. 1190; St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Daly v. Berry, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion).

[12] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 S. Ct. 1120; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Daly v. Beery, 45 N. D. 287, 178 N. W. 104, citing R. C. L. (concurring opinion).

[13] State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138.

[14] Re Spencer, 228 U. S. 652, 57 L. ed. 1010, 33 S. Ct. 709.

[15] Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.

[16] See infra, § 154.

[17] Security Sav. Bank v. Connell, 198 Iowa, 564, 200 N. W. 8, 36 A.L.R. 486; Servonitz v. State, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955.

[18] Vanuxem v. Hazlehursts, 4 N. J. L. 192, 7 Am. Dec. 582.

[19] St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082.

Annotation: 64 Am. Dec. 51.

[20] Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L.R.A.(N.S.) 1112, 118 Am. St. Rep. 884.

[1] Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212; Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

§ 149. Protection of Rights.—The general rule is that an unconstitutional act of the legislature protects no one.[2] It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one. Consequently, if any person acts under an unconstitutional statute, the general rule is that he does so at his peril and must take the consequences.[3] This warning has been so phrased as to present the actual concept underlying the utter nullity of an invalid law by a holding to the effect that all persons are held to notice that all statutes are subject to all express and implied applicable provisions of the Constitution, and also that should a conflict between a statute and any express or implied provision of the Constitution be duly adjudged, the Constitution by its own superior force and authority would render the statute invalid from its enactment, and further that the courts have no power to control the effect of the Constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the Constitution.[4] Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid, though the statute was considered valid by eminent attorneys, public officers, and others.[5]

This general principle as to rights has varied practical applications. Thus, it is held that the fact that one acts in reliance on a statute which has theretofore been adjudged unconstitutional does not protect him from civil or criminal responsibility, if his act otherwise subjects him to such liability.[6] In the majority of jurisdictions it is held that reliance on a statute which subsequently is declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon, which would otherwise subject him to liability.[7] On the other hand, occasionally the position has been taken, as far as omissions to perform some duty are concerned, that reliance on a statute which is subsequently held to be unconstitutional protects from civil or criminal liability one who omits an act which, but for the statute, would be required by law.[8] As far as criminal responsibility is concerned, it is generally conceded that mistaken belief in, or reliance upon, the constitutionality of a statute is a good defense in a criminal prosecution.[9] It is also generally held, however, that mistaken belief in, or reliance upon, the unconstitutionality of a statute is no defense.[10]

It has been declared that an unconstitutional act cannot operate to create an office,[11] and any department of government exceeding the limits of its constitutional power acts wholly without authority and can confer no authority on others.[12] This doctrine, however, is not enforced rigorously; it is generally recognized that until a statute has been declared unconstitutional,

[2] See supra, § 148.

[3] Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718.
Annotation: 64 Am. Dec. 53.

[4] State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

[5] Ibid.

[6] Annotation: 53 A.L.R. 269.

[7] Highway Comrs. v. Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471; Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407.
Annotation: 53 A.L.R. 269.

[8] Texas Co. v. State, 31 Ariz. 485, 254 P. 1060, 53 A.L.R. 258.
Annotation: 53 A.L.R. 273.

[9] Annotation: 61 A.L.R. 1153.

[10] Annotation: 61 A.L.R. 1154.

[11] State v. Candland, 36 Utah, 406, 104 P. 285, 140 Am. St. Rep. 834; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061.

[12] Kelley v. Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50.
Annotation: 64 Am. Dec. 51, 55.

it is sufficient to confer on an officer acting under it such color of title as will constitute him an officer de facto.[13] Furthermore, the title to office of a successful candidate cannot be affected, after election, by a decision holding invalid the statute under which the nominations are made.[14]

Whether an unconstitutional act of the legislature is sufficient to form the basis for a corporation de facto is a question as to which the courts are not entirely agreed.[15]

The courts appear to be divided on the question as to the extent to which moral obligations may be recognized as arising out of unconstitutional laws. Some hold that persons acting under such a statute are recognized as having moral obligations sufficient to sustain appropriation for their payment from the public treasury.[16] Other courts take the opposite view.[17]

One result of the unconstitutionality of a statute is to relieve a person from the obligation of complying with provisions inserted in a contract merely to comply with the requirements of such law. In cases of that sort the binding force of the stipulations and provisions so inserted depends on the validity of the statute requiring their insertion; and if this statute is unconstitutional, these stipulations, although incorporated in the contract, are not considered as of binding force upon the parties to such contract.[18] Similarly, the acceptance of a license under a state law does not impose on the holder any obligation to comply with any provisions of the statute or regulations prescribed by the state which in fact are repugnant to the Constitution.[19]

With reference to real property the Supreme Court has indicated that possession taken under authority of a statute is under color of title even if such a statute is unconstitutional.[20]

2. Statutes Creating Criminal Offenses

§ 150. Generally.—The general principle that legal effect should not be given to unconstitutional laws[1] has been applied to statutes creating criminal offenses which are in violation of the Constitution. It has been decided that an offense created by an unconstitutional law is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal

[13] Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Pooler, 105 Me. 224, 74 A. 119, 24 L.R.A.(N.S.) 408, 134 Am. St. Rep. 543; Lang v. Bayonne, 74 N. J. L. 455, 68 A. 90, 15 L.R.A.(N.S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961.
The acts of public officers, whether they are state, county, district or municipal, created by an act of the legislature, are valid as to the public and all persons having dealings with the officers antecedent to the time when the legislative act under which they were exercising authority was declared unconstitutional. Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115, 45 L.R.A.(N.S.) 1101, Ann. Cas. 1915C, 493.
For general discussion, see Public Officers [Also 22 R. C. L. p. 588, § 306].

[14] People ex rel. Lindstrand v. Emmerson, 333 Ill. 606, 165 N. E. 217, 62 A.L.R. 912.

[15] See Corporations [Also 7 R. C. L. pp. 61, 62, § 43].

[16] United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 S. Ct. 1120; Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67.

[17] Michigan Sugar Co. v. Auditor Gen. 124 Mich. 674, 83 N. W. 625, 56 L.R.A. 329, 83 Am. St. Rep. 354; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L. wherein the court points out the two conflicting views on this question, but follows the rule holding the bond or contract void.
A municipality can exercise only such powers as are conferred by law; and where a legislative enactment purports to confer upon a municipality authority to issue bonds, and such authority is in conflict with express or implied provisions of the Constitution, the enactment confers no authority, and bonds issued thereunder are void, even in the hands of bona fide holders, and the municipality is not estopped to deny the validity of the bonds. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298.

[18] Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 65 N. E. 885, 59 L.R.A. 775, 93 Am. St. Rep. 670.

[19] W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 S. Ct. 423.

[20] White v. Sparkill Realty Corp. 280 U. S. 500, 74 L. ed. 578, 50 S. Ct. 186.

[1] See supra, § 148.

cause of imprisonment; the courts must liberate a person imprisoned under it just as if there had never been the form of a trial, conviction, and sentence.[2] Thus, one imprisoned by the judgment of a court which is without jurisdiction in the premises because proceeding under an unconstitutional law may be discharged by the writ of habeas corpus.[3] There are, however, certain apparent limitations and exceptions to the general principle, occasioned either by the interests of the community or by the rights of individuals. Where a person is committed under an unconstitutional statute to an insane asylum, the general rule seems to be that he is not entitled immediately to his liberty under a writ of habeas corpus, but that the court should direct his retention for a reasonable time so that an inquisition may be had in proper form, thereby protecting the community from the presence at large of a person dangerously insane.[4]

A former conviction under an unconstitutional law, when acquiesced in by the accused, has been held to be a bar to a second prosecution for the same offense.[5] It has also been decided that a person cannot be punished for selling intoxicating liquor at a time when the prohibitory law was by decision of the highest courts of the state held to be unconstitutional, although that court subsequently changed its opinion and determined that the act was valid.[6]

3. Validation of Unconstitutional Statutes

§ 151. Generally.—While it has been broadly stated that an unconstitutional act cannot be validated by the legislature,[7] it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the Constitution.[8] The distinction seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the Constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing against it, then the statute may be rendered valid by amendment, so far as its future operation may extend.[9]

[2] Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Kelley v. Meyers, 124 Or. 322, 263 P. 903, 56 A.L.R. 661; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

Annotation: 3 Ann. Cas. 581.

If a state legislature passes an ex post facto law or a law impairing the obligation of contracts, it remains a harmless enactment on the statute book. Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903.

[3] Ex parte Bornee, 76 W. Va. 360, 85 S. E. 529, L.R.A.1915F, 1093.

For general discussion of securing the release of a person convicted under an unconstitutional law creating a criminal offense, see Habeas Corpus [Also 12 R. C. L. p. 1198, § 18].

[4] Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[5] McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

As to former jeopardy generally, see Criminal Law [Also 8 R. C. L. p. 134, §§ 114 et seq.].

[6] State v. O'Neil, 147 Iowa, 513, 126 N. W. 454, 33 L.R.A.(N.S.) 788, Ann. Cas. 1912B, 691.

Annotation: 33 L.R.A.(N.S.) 788.

[7] Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L.R.A.(N.S.) 1112, 118 Am. St. Rep. 884; Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; State v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L.R.A. 777.

Annotation: 60 L.R.A. 564.

Compare Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545, citing R. C. L.

[8] Allison v. Corker, 67 N. J. L. 596, 52 A. 362, 60 L.R.A. 564; State v. Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L.R.A. 737; Com. v. Great American Indem. Co. 312 Pa. 183, 167 A. 793, citing R. C. L. (recognizing rule).

Annotation: 60 L.R.A. 564.

[9] People v. De Blaay, 137 Mich. 402, 100 N. W. 598, 4 Ann. Cas. 919; Seneca Min. Co. v. Osmun, 82 Mich. 573, 47 N. W. 25, 9 L.R.A. 770; State v. Tufly, 20 Nev. 427, 22 P. 1054, 19 Am. St. Rep. 374; Paris Mountain Water Co. v. Greenville, 110 S. C. 36, 96 S. E. 545, citing R. C. L. (this later view must be taken as modifying the effect of Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349, which holds that the removal of the constitutional objections to a statute that rendered it null and void does not, by operation of law, give it force and effect, nor can it be made valid by a subsequent statute).

Annotation: 4 Ann. Cas. 920.

[10] Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

Annotation: 38 L.R.A.(N.S.) 77.

[11] Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417.

New Article 10 of the Constitution of Ohio, adopted November 7, 1933, added nothing in the way of constitutionality to §§ 2750 and 2750-1, General Code (115 Ohio Laws, pp. 191 and 192). Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417.

[12] Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. ed. 212.

[13] Atkinson v. Southern Exp. Co. 94 S. C. 444, 78 S. E. 516, 48 L.R.A.(N.S.) 349; State v. Miller, 66 W. Va. 436, 66 S. E. 522, 19 Ann. Cas. 604.

Annotation: 48 L.R.A.(N.S.) 350.

[14] Re Rahrer (Wilkinson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Re Van Vliet (C. C.) 43 F. 761, 10 L.R.A. 451; Re Spickler (C. C.) 43 F. 653, 10 L.R.A. 446; Blair v. Ostrander, 109 Iowa, 204, 80 N. W. 330, 47 L.R.A. 469, 77 Am. St. Rep. 532.

Annotation: 48 L.R.A.(N.S.) 349, 350; 19 Ann. Cas. 606, 607.

[15] Annotation: 19 Ann. Cas. 608.

[16] Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; State v. Matson Co. 182 Wash. 507, 47 P. (2d) 1003, citing R. C. L. (orders which were void under an invalid state agricultural law cannot be validated under a subsequent law of the same nature).

[17] Felix v. Wallace County, 62 Kan. 832, 62 P. 667, 84 Am. St. Rep. 424.

[18] See infra, §§ 180 et seq.

In some jurisdictions the view has been taken that a constitutional amendment may also have the effect of ratifying as of their respective dates legislative acts which have been declared void as inconsistent with the Constitution prior to such amendment.[10] Elsewhere the rule has been stated that an act of the general assembly, which was unconstitutional at the time of enactment, can be revivified only by re-enactment.[11]

It is clear that Congress cannot, by authorization or ratification, give the slightest effect to a state law or Constitution which is in conflict with the Constitution of the United States.[12] Whether an act of Congress can validate state statutes which were previously invalid because inconsistent with Federal legislation has not been uniformly decided. One view states that a state statute which was unconstitutional because it amounted to a violation of the power of Congress over interstate commerce is not validated by an act of Congress dealing with the subject matter which would render a later application of the state act merely supplemental to the act of Congress. This holding results from the theory that the removal of constitutional objections to an unconstitutional statute does not validate or revive it.[13] Other cases dealing with similar laws, however, have held that state laws previously enacted which were unconstitutional come into full operation after passage of an act by Congress removing constitutional objections, without re-enactment, but these cases also have taken the position that the statutes thus revivified by congressional action were not unconstitutional, but merely inoperative as to interstate commerce.[14] The same principle has been applied to state insolvency laws after repeal of a Federal bankruptcy statute, and it has been held unnecessary to re-enact such laws to make them effective.[15]

Questions occasionally arise as to the extent to which the legislature may validate proceedings under unconstitutional laws. The general rule is that this cannot be done.[16] Similarly, it has been decided that the legislature cannot legalize municipal warrants issued under void statutes.[17] The grounds for such decisions seem to rest on the principles underlying the separation of the powers of government. This subject is treated at length elsewhere.[18]

K. Partial Unconstitutionality of Statutes

1. In General

§ 152. Generally.—It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected.[19]

[19] **United States.**—Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323; Keller v. Potomac Electric Power Co. 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; Dahnke-Walker Mill. Co. v. Bondurant, 257 U. S. 282, 66 L. ed. 239, 42 S. Ct. 106; Bowman v. Continental Oil Co. 256 U. S. 642, 65 L. ed. 1139, 41 S. Ct. 606; Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 S. Ct. 206; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 S. Ct. 110; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 S. Ct. 912; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Eilenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 S. Ct. 424; Little Rock & Ft. S. R Co. v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Evansville Nat. Bank v. Britton, 105 U. S. 322, 26 L. ed. 1053; Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Penniman's Case (Vial v. Penniman) 103 U. S. 714, 26 L. ed. 602; Unity v. Burrage, 103 U. S. 447, 26 L. ed. 405; Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648; Bank of Hamilton v. Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; Lawton v. Comer (D. C.) 40 F. 480, 7 L.R.A. 55; Thomas v. Wabash, St. L. & P. R. Co. (C. C.) 40 F. 126, 7 L.R.A. 145.

Alabama.—Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052; State ex rel. Collman v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; State v. Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 632, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92; Birmingham v. O'Connell, 13 Ala. App. 570, 68 So. 586 (writ of certiorari denied in 195 Ala. 60, 70 So. 184, which has writ of error dismissed in 250 U. S. 654, 63 L. ed. 1191, 40 S. Ct. 53) citing R. C. L.

Arizona.—Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

Arkansas.—Wasson v. Planters' Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 63 A.L.R. 1018; Snetzer v. Gregg, 129 Ark. 542, 196 S. W. 925, L.R.A. 1917F, 999; Ex parte Byles, 93 Ark. 612, 126 S. W. 94, 37 L.R.A.(N.S.) 774, writ of error dismissed in 225 U. S. 717, 56 L. ed. 1270, 32 S. Ct. 836; Wells, F. & Co's Exp. v. Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L.R.A. 371; Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L.R.A. 353.

California.—Gillum v. Johnson, 7 Cal. (2d) 744, 62 P. (2d) 1037, 63 P. (2d) 810, 108 A.L.R. 595; Jardine v. Superior Ct. 213 Cal. 301, 2 P. (2d) 756, 79 A.L.R. 291, appeal dismissed in 284 U. S. 592, 76 L. ed. 510, 52 S. Ct. 197; Wallace v. Zinman, 209 Cal. 585, 254 P. 946, 62 A.L.R. 1341; Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; Re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am. St. Rep. 138; Robinson v. Southern P. Co. 105 Cal. 526, 38 P. 94, 722, 28 L.R.A. 773; Brooks v. Fischer, 79 Cal. 173, 21 P. 652, 4 L.R.A. 429; Maclay v. Love, 25 Cal. 367, 85 Am. Dec. 133.

Colorado.—Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907.

Connecticut. — State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324.

Delaware. — Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

Florida.—McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L.R.A. 819.

Hawaii.—Territory v. Hoy Chong, 21 Haw. 39, Ann. Cas. 1915A, 1155.

Idaho.—Ballentine v. Willey, 3 Idaho, 496, 31 P. 994, 95 Am. St. Rep. 17.

Illinois.—Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 666, 66 L. ed. 431, 42 S. Ct. 24; Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; State Pub. Utilities Commission ex rel. Mitchell v. Chicago &

This doctrine which has been employed in hundreds of cases to salvage unobjectionable and separable portions of statutes where unconstitutional portions

W. T. R. Co. 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; People ex rel. Honore v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992; People ex rel. Bradley v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139.

Indiana.—Miles v. Department of Treasury, — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded in — Ind. —, 199 N. E. 372, 101 A.L.R. 1359, but this point not superseded; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D, 258, affirmed in 239 U. S. 637, 60 L. ed. 480, 36 S. Ct. 445; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Dixon v. Poe, 159 Ind. 492, 65 N. E. 518, 60 L.R.A. 308, 95 Am. St. Rep. 309; Taggart v. Claypool, 145 Ind. 590, 44 N. E. 18, 32 L.R.A. 586; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469.

Iowa.—Davidson Bldg. Co. v. Mulock, 212 Iowa, 730, 235 N. W. 45, citing R. C. L.; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

Kansas.—Voran v. Wright, 129 Kan. 691, 284 P. 807, citing R. C. L.; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289.

Kentucky. — State Flection Comrs. v. Coleman, 235 Ky. 24, 29 S. W. (2d) 619, citing R. C. L.; Kirchdorfer v. Tincher, 204 Ky. 366, 264 S. W. 766, 40 A.L.R. 801; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A.1917B, 898; Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454.

Louisiana.—State v. Lange, 168 La. 958, 123 So. 639, 67 A.L.R. 1447; State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574.

Maryland.—Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; Daly v. Morgan, 69 Md. 460, 16 A. 287, 1 L.R.A. 757; Berry v. Baltimore & D. Point R. Co. 41 Md. 446, 20 Am. Rep. 69.

Massachusetts.—Thurman v. Chicago, M. & St. P. R. Co. 254 Mass. 569, 151 N. E. 63, 46 A.L.R. 563; Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53; Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; Com. v. Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; Com. v. Gagne, 153 Mass. 205, 26 N. E. 449, 10 L.R.A. 442; Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Com. v. Farmers & M. Bank, 21 Pick. 542, 32 Am. Dec. 290.

Michigan.—People ex rel. Moll v. Danziger, 238 Mich. 39, 213 N. W. 448, 52 A.L.R. 136; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Sault Ste. Marie Hospital v. Chippewa County Treasurer, 209 Mich. 684, 177 N. W. 927, citing R. C. L. (concurring opinion).

Minnesota.—State ex rel. Matteson v. Luecke, 194 Minn. 246, 260 N. W. 206, 99 A.L.R. 1053; Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A.L.R. 561; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; State ex rel. Scheffer v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L.R.A. 757, 89 Am. St. Rep. 550; State v. Duluth Gas & Water Co. 76 Minn. 96, 78 N. W. 1032, 57 L.R.A. 63.

Mississippi.—American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 575, L.R.A.1918B, 446, Ann. Cas. 1916D, 127.

Missouri.—Masterson v. Roberts, 336 Mo. 158, 78 S. W. (2d) 856, 97 A.L.R. 862; State ex rel. Barker v. Duncan, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916D, 1; Nalley v. Home Ins. Co. 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 52 S. W. 595, 45 L.R.A. 363; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Montana.—Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

Nebraska.—Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431; Re Groff, 21 Neb. 647, 33 N. W. 426, 59 Am. Rep. 859.

New Hampshire.—State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528.

New Jersey.—Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; Riccio v. Hoboken, 69 N. J. L. 649, 55 A. 1109, 63 L.R.A. 485.

New Mexico.—State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136.

New York.—People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514; City Bank Farmers' Trust Co. v. New York C. R. Co. 253 N. Y. 49, 170 N. E. 489, 69 A.L.R. 940; E. Fougera & Co. v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 36 L. ed. 666, 12 S. Ct. 880; People ex rel. Fowler v. Bull, 46 N. Y. 57, 7 Am. Rep. 302.

North Dakota.—State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Becker County Sand & Gravel Co. v. Wosick, 62 N. D. 740, 245 N. W. 454, citing R. C. L.; State v. Ehr, 57 N. D.

have been eradicated is best illustrated by a few examples. The following have been held to be separable portions of statutes: A discrimination against former citizens who entered the armies of the Allies in a statute providing for loans by the state to enable war veterans to secure land;[20] provisions inserted in a statute against usury which fix a limitation upon the commissions of loan brokers and which are invalid because not covered by the title;[1] a provision in an eminent domain statute (which statute is otherwise valid in authorizing the acquisition of described land by purchase) which is inoperative in so far as it attempts to exercise the power of eminent domain by reason of its failure to provide just compensation;[2] a provision in a statute regulating the production of petroleum and natural gas, prohibiting the taking of petroleum at a time when there is not a market demand therefor at the well at a price equivalent to its actual value as determined by a standard prescribed by the statute;[3] a provision for breaking a deadlock with respect to the transaction of county business by county commissioners where the statute otherwise validly affects the appointment of incumbents for offices created by the legislature;[4] and a provision creating an unconstitutional presumption of

310, 221 N. W. 883, citing R. C. L.: State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207.

Ohio.—Treasurer v. People's & D. Bank, 47 Ohio St. 503, 25 N. E. 697, 10 L.R.A. 196.

Oklahoma.—State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561.

Oregon.—State v. 1920 Studebaker Touring Car, 120 Or. 254, 251 P. 701, 50 A.L.R. 81; Standard Lumber Co. v. Pierce, 112 Or. 314, 228 P. 812, citing R. C. L.

Pennsylvania.—Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086; Com. ex rel. Elkins v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801; Rothermel v. Meyerle, 136 Pa. 250, 20 A. 583, 9 L.R.A. 366; Titusville Iron-Works v. Keystone Oil Co. 122 Pa. 627, 15 A. 917, 1 L.R.A. 361.

Rhode Island.—Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305.

South Carolina.—State v. Johnson, 76 S. C. 39, 56 S. E. 544, 11 Ann. Cas. 721; Utsey v. Hiott, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910; State ex rel. Atty. Gen. v. Platt, 2 S. C. 150, 16 Am. Rep. 647; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23.

South Dakota.—Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145; Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954.

Tennessee. — Rhinehart v. State, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254; Fite v. State, 114 Tenn. 646, 88 S. W. 941, 1 L.R.A.(N.S.) 520, 4 Ann. Cas. 1108.

Texas.—Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484; Davis v. White (Tex. Civ. App.) 260 S. W. 138, citing R. C. L.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Washington.—State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

Wisconsin. — State ex rel. Wisconsin Teleph. Co. v. Henry, 218 Wis. 302, 260 N. W. 486, 99 A.L.R. 1267; State ex rel. Cronkhite v. Belden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 117 N. W. 686, 19 L.R.A.(N.S.) 326; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

Wyoming.—McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L. (recognizing rule): Zancanelli v. Central Coal & Coke Co. 25 Wyo. 511, 173 P. 988, citing R. C. L.

Annotation: 66 Am. St. Rep. 505; 95 Am. St. Rep. 28; Ann. Cas. 1916D, 10, 14.

[20] Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145.

[1] Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341.

The provisions of a statute requiring a license to engage in the business of reselling tickets to places of amusement and fixing the resale price are severable, so that a conviction for engaging in such business without a license may be sustained, although the provision fixing the resale price may be found to be invalid. Weller v. New York, 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556.

The possible invalidity of so much of a statute, licensing and regulating private employment agencies, as prescribes the fees which may be demanded or retained does not affect the validity of other provisions of the act from which the provision in respect of fees is separable. Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522.

[2] State v. McCook, 109 Conn. 621, 147 A. 126, 64 A.L.R. 1453.

[3] Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403.

[4] Kirchdorfer v. Tincher, 204 Ky. 366, 264 S. W. 766, 40 A.L.R. 801.

guilt of corporate directors in case of fraudulent insolvency in a general fraudulent insolvency statute.[5]

The natural corollary to the rule is as firmly affixed in the field of constitutional law as the rule itself. It is to the effect that where it is not possible to separate that part of an act which is unconstitutional from the rest of the act, the whole statute falls.[6] This principle is also best illustrated by examples. Thus, an act imposing a tax as a condition of admitting a foreign corporation to do business within the state and an act imposing a franchise tax based upon the aggregate amount of capital stock, surplus, and undivided profits are, from the character of the subject matter and the mode in which it is dealt with, interdependent, and the unconstitutionality of one will invalidate the other.[7] The same corollary applies to invalidate the following: A provision of the statute for payment of salaries of certain officers charged with the administration of justice in a certain city from the state treasury, as well as another provision of the statute relieving the city from liability to pay certain fees to which the officers are entitled as compensation;[8] a provision of an act of the legislature for a jury list including electors of both sexes and a provision therein that it shall not be in force unless the question of its adoption is submitted to the legal voters of the state and approved by a majority of the votes cast upon the proposition;[9] a section of a state code providing for the quadrennial election of county recorders, beginning with the election of 1936, and providing that a recorder so elected shall hold office for four years, and another portion of the statute eliminating an election in 1934, which would automatically extend the term of incumbents unconstitu-

[5] People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514.

[6] Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 84; Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 S. Ct. 453; Bowman v. Continental Oil Co. 256 U. S. 642, 65 L. ed. 1139, 41 S. Ct. 606; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, 34 S. Ct. 333, L.R.A.1915F, 1187; International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 30 S. Ct. 481, 27 L.R.A.(N.S.) 493, 18 Ann. Cas. 1103; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 S. Ct. 912; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 S. Ct. 656, 763; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; State ex rel. Moodie v. Bryan, 50 Fla. 293, 39 So. 929; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; State ex rel. White v. Wyandotte County, 140 Kan. 744, 39 P. (2d) 286, citing R. C. L.; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903, affirmed in 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Gretna v. Bailey, 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566; Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Nalley v. Home Ins. Co. 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839; Fougera v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640, Ann. Cas. 1918D, 916; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Standard Lumber Co. v. Pierce, 112 Or. 314, 228 P. 812, citing R. C. L.; Ex parte Massey, 49 Tex. Crim. Rep. 60, 92 S. W. 1086, 122 Am. St. Rep. 784; State v. Edwards, 95 W. Va. 599, 122 S. E. 272, citing R. C. L.; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

Annotation: 36 Am. St. Rep. 322.

[7] Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 S. Ct. 85.

[8] Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058.

[9] People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044.

tionally;[10] and a provision of a state "Bank Collection Code," as applied to national banks, allowing a preference in the assets of a bank which has failed after having charged an item presented to it to the account of the maker or drawer without having settled for the same in money or an unconditional credit, regardless of ability to trace the fund, as well as the entire act, where it comprises one entire scheme and rights taken away are compensated for by the preference attempted to be created.[11]

The difficulty presented in such cases arises from the question of the determination of severability itself. The tests used are connected with, and based upon, the ultimate factor as to what the legislature intended,[12] but even so certain objective criteria are very valuable in ascertaining both the intent to create a separable act and the actual creation of it. Thus, it is stated that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions.[13] For example, the elimination from a tax statute of a provision unconstitutionally allowing special exemptions to holders of bank stock will not invalidate the statute if a complete and valid system for assessing such property remains after the elimination.[14] In any case where it is sought to apply the general rule, the constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself.[15] No matter how invoked, the rule must be employed with the qualification that if it is impossible to tell what part of a statute is intended to be operative when some of its provisions are unconstitutional, it is wholly invalid.[16] Consequently, where the legislature intends to substitute a new

10 Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417.

11 People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090.

12 See infra, § 155.

13 Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100; Polzin v. Rand, 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471; People v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371; Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454; State v. Firemen's Fund Ins. Co. 152 Mo. 1, 52 S. W. 595, 45 L.R.A. 363; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431.

Annotation: 31 Am. St. Rep. 601.

For the closely allied problem that elimination of nonessential portions of an act will not affect the validity or the operation of the general scheme, see infra, § 158.

14 Stillman v. Lynch, 56 Utah, 540, 192 P. 272, 12 A.L.R. 552.

15 Dorchy v. Kansas, 264 U. S. 286, 63 L. ed. 686, 44 S. Ct. 323; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 S. Ct. 912; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 S. Ct. 656, 763; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Taggart v. Claypool, 145 Ind. 590, 44 N. E. 18, 32 L.R.A. 536; State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 575, 22 N. E. 778, 6 L.R.A. 579; Davidson Bldg. Co. v. Mulock, 212 Iowa, 730, 235 N. W. 45, citing R. C. L.; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A.1917B, 808; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476; St. Louis v. Grafeman Dairy Co. 190 Mo. 492, 89 S. W. 617, 1 L.R.A.(N.S.) 936; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L.R.A. 638, 47 Am. St. Rep. 653; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431; City Bank Farmers' Trust Co. v. New York C. R. Co. 253 N. Y. 49, 170 N. E. 489, 69 A.L.R. 940; Skaneateles Waterworks Co. v. Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L.R.A. 687, rehearing denied in 161 N. Y. 658, 57 N. E. 1124, and affirmed in 184 U. S. 354, 46 L. ed. 585, 22 S. Ct. 400; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Fite v. State, 114 Tenn. 676, 88 S. W. 941, 1 L.R.A.(N.S.) 520, 4 Ann. Cas. 1108.

16 Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

system of taxation as a whole for the existing one, and all the provisions cannot be carried into effect because of constitutional infirmity, and it is impossible to tell what part the legislature would have adopted independently, the entire statute is void.[17]

In the determination of the question whether the parts of a statute are severable within the meaning of these tests, courts act by inspection of the statute.[18] It is, however, the duty of the courts, even though the legislature may not have expressed its will to that effect, to sever the valid from the invalid provisions of a statute and preserve the former if they relate to a distinct purpose which is not dependent upon the invalid provisions.[19] Moreover, in the determination of the question of the validity or invalidity of particular provisions of public laws, courts should not be unmindful of the effect upon the entire enactment of the holding of any particular provision invalid.[20]

The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable so that some stand while others fall.[1] An unconstitutional provision in a state statute taxing commerce is not cured, however, because included in the same act with valid provisions.[2] It has also been recognized that a preamble of an act may be severed from the rest of a statute.[3]

In view of the established custom of judicial tribunals of avoiding the determination of questions as to the constitutionality of statutes except when necessary in deciding litigated cases,[4] the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional where they are of the opinion that if such provision should in fact be invalid, it may be

17 Williams v. State, 81 N. H. 341, 125 A. 661, 39 A.L.R. 490.

18 Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431.

See also Utah Power, etc. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548, referring to what conclusions may be drawn from the face of the legislation.

19 Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court so to declare and to maintain the act in so far as it is valid. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 S. Ct. 21.

If a construction can be given an act which will render it constitutional, that construction will be adopted, even though it may eliminate a part of the act. Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008.

For general rules of construction favoring validity, see supra, §§ 97, 100.

20 Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24.

1 Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 S. Ct. 174; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090 (recognizing rule); Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A. 1915B, 247, Ann. Cas. 1915A, 772; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L.R.A. 1917B, 808; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397, affirmed in 201 U. S. 359, 50 L. ed. 788, 26 S. Ct. 473; Baltimore v. O'Conor, 147 Md. 639, 128 A. 759, 40 A.L.R. 1058; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.; Treasurer v. People's & D. Bank, 47 Ohio St. 593, 25 N. E. 697, 10 L.R.A. 196; Rothermel v. Meverle, 136 Pa. 250, 20 A. 583, 9 L.R.A. 366; Steed v. Harvey, 18 Utah, 367, 54 P. 1011, 72 Am. St. Rep. 789; Nathan v. Spokane County, 35 Wash. 26, 76 P. 521, 65 L.R.A. 336, 102 Am. St. Rep. 888.

Annotation: Ann. Cas. 1916D, 16.

2 Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118.

3 Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.

4 See supra, § 93.

severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court.[5]

The general principles as to the severability of statutes and the elimination of unconstitutional provisions apply to municipal ordinances as well as to state and Federal statutes.[6]

§ 153. In What Courts Severability Is Determined.—In accordance with the general principles that the construction of a state statute is primarily a matter to be determined by the state courts[7] in whose conclusions the Federal courts will acquiesce,[8] the task of determining whether a state legislature intends the valid portions of a statute to stand in case others should fall rests primarily

[5] Champlin Ref. Co. v. Corp. Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 S. Ct. 663; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 S. Ct. 167; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; United States v. Stanley, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Woods v. Carl, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas. 423, affirmed in 203 U. S. 358, 51 L. ed. 219, 27 S. Ct. 99; Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100; Ex parte Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; People ex rel. Graves v. McFadden, 81 Cal. 489, 22 P. 851, 15 Am. St. Rep. 66; People v. Whyler, 41 Cal. 351; Maclay v. Love, 25 Cal. 367, 85 Am. Dec. 133; State v. Kiesman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L.R.A. 819; People ex rel. Patterson v. Long, 297 Ill. 194, 130 N. E. 515, citing R. C. L.; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Hammer v. State, 173 Ind. 199, 89 N. E. 859, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Com. v. Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; Com. v. Farmers & M. Bank, 21 Pick. (Mass.) 542, 32 Am. Dec. 290; Jackson v. State, 102 Miss. 663, 59 So. 873, Ann. Cas. 1915A, 1213; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508; Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274; State ex rel. Abelman v. Douglass, 46 Nev. 121, 208 P. 422, citing R. C. L.; State v. Ehr, 57 N. D. 310, 221 N. W. 883, citing R. C. L.; Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E, 1324; Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330; State ex rel. Thompson v. Crump, 134 Tenn. 121, 183 S. W. 505, L.R.A.1916D, 951; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; McDermott v. State, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315, reversed on other grounds in 228 U. S. 115, 57 L. ed. 754, 33 S. Ct. 431, 47 L.R.A.(N.S.) 984, Ann. Cas. 1915A, 39; Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702.

Annotation: 4 Ann. Cas. 279; Ann. Cas. 1916D, 17.

A necessity for passing on the constitutionality of provisions of a statute other than those directly involved in the suit does not exist where such provisions are separable. Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403.

A railroad company prosecuted for violating the provisions of a statute requiring it to remodel caboose cars which go into the shop for repairs cannot question the validity of sections of the statute attempting to confer powers upon the railroad commission, the provisions of which are not necessary to the determination of the cause and are separable from the sections under which the prosecution is conducted. Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458.

[6] Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 S. Ct. 116; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 S. Ct. 449; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100; Re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am. St. Rep. 138; State ex rel. Ellis v. Tampa Waterworks Co. 56 Fla. 858, 47 So. 358, 19 L.R.A.(N.S.) 183; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Field v. Malster, 88 Md. 691, 41 A. 1087; Koch v. North Ave. R. Co. 75 Md. 222, 23 A. 463, 15 L.R.A. 377; People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L.R.A. 721, 16 Am. St. Rep. 578; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Magneau v. Fremont, 30 Neb. 843, 47 N. W. 280, 9 L.R.A. 786, 27 Am. St. Rep. 436; Williams v. Park (Williams v. Warren) 72 N. H. 305, 56 A. 463, 64 L.R.A. 33; Fougera v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; Eureka City v. Wilson, 15 Utah, 67, 48 P. 150, 62 Am. St. Rep. 904; Little Chute v. Van Camp, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100.

Annotation: 62 Am. St. Rep. 910; 4 Ann. Cas. 279; Ann. Cas. 1916D, 14.

[7] See supra, §§ 106, 108.

[8] See supra, § 109.

upon the state court.[9] Its decision as to the severability of a provision is conclusive upon the Federal Supreme Court.[10]

In cases coming into the Supreme Court of the United States from a state court, involving the question of the constitutionality of a statute, that court, in case of absence of a controlling state decision upon the question of severability, may leave the determination of the question to the state court. If, however, the case involving such a problem comes up to the Supreme Court from lower Federal courts, the question of severance of invalid portions of a statute must be determined by that court if there is no controlling state decision.[11]

§ 154. Amendatory Acts; Statutes Containing Repealing Clauses.—The rule that the invalidity of a part of a statute does not extend to the whole statute unless the parts are interdependent is especially applicable to amendments and amendatory acts.[12] Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it.[13] Thus, a proviso to a statute requiring a license to operate a cotton gin, which may be granted only in case of public necessity, which proviso is added by amendment some time after the statute is passed and excepts certain classes of corporations from the operation of the statute, is separable from the statute itself so that its unconstitutionality will not render the whole act unconstitutional.[14] Similarly, a provision added by amendment to a statute which, as originally enacted, provided that a judgment in an action brought under it against members of an association shall bind the joint property of the associates, that such judgment shall also bind the individual property of the party or parties served with process is severable, so that even if the amending provision should be held unconstitutional, the validity of the original provision will not be affected.[15] It has even been held that if a portion of an act which is an amendment of another act already in force is invalid and is inseparable from the remainder of the amendment, the entire amending act may be declared inoperative without in any way affecting the original act.[16]

Another familiar application of the general principle is found in cases in which statutes containing repealing clauses have been held to be unconstitutional. The general rule is that the clause containing the repeal is incidental to the rest of the statute, and that if the latter is invalid, the clause containing

[9] Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323; People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514.

[10] Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441; Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 S. Ct. 423; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 S. Ct. 136.

Whether certain portions of a state statute alleged to violate the Federal Constitution are severable and may be eliminated without destroying the other portions is a matter of state cognizance as to which the Supreme Court of the United States will accept the decision of the state court. Olsen v. Smith, 195 U. S. 332, 49 L. ed. 224, 25 S. Ct. 52.

Whether a local statute can be construed as separable is ultimately for the state court to determine after the act has been held unconstitutional in the Federal Supreme Court because the tax laid thereby interferes with interstate commerce; the Federal courts cannot reshape it simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent. Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218.

[11] Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323.

[12] Annotation: Ann. Cas. 1916D, 21 et seq.

[13] Davis v. Wallace, 257 U. S. 478, 66 L. ed. 325, 42 S. Ct. 164; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 S. Ct. 464.

[14] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

[15] Jardine v. Superior Ct. 213 Cal. 301, 2 P. (2d) 756, 79 A.L.R. 291, appeal dismissed in 284 U. S. 592, 76 L. ed. 510, 52 S. Ct. 197.

[16] Annotation: Ann. Cas. 1916D, 22.

the repeal will likewise be deemed invalid, leaving the prior general law unrepealed.[17] It must be pointed out, however, that the question in every case is whether the legislature intended that the repeal should take effect in any event—that is, whether the repeal provision is severable.[18]

§ 155. Intention of Legislature.—The question as to whether portions of a statute which are constitutional shall be upheld while other divisible portions are eliminated as unconstitutional is primarily one of intention. If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional.[19] If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid.[20] The principle that after elimination of invalid

17 State ex rel. Law v. Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411; State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.(N.S.) 344, Ann. Cas. 1913A, 1247; People v. De Blaay, 137 Mich. 402, 100 N. W. 598, 4 Ann. Cas. 919; State ex rel. Keyser v. Hallock, 14 Nev. 202, 33 Am. Rep. 559; Williams v. State, 81 N. H. 341, 125 A. 661, 39 A.L.R. 490; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 79 N. E. 884, 10 L.R.A.(N.S.) 625, 10 Ann. Cas. 101; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; State v. Savage, 96 Or. 53, 184 P. 567, 189 P. 427, citing R. C. L.; Mazurek v. Farmers' Mut. F. Ins. Co. 320 Pa. 33, 181 A. 570, 102 A.L.R. 798; State ex rel. Kemninger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67.

Annotation: 102 A.L.R. 803; Ann. Cas. 1916D, 23.

18 Annotation: 102 A.L.R. 803.

19 **United States.** — Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 S. Ct. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141; Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 S. Ct. 110; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537.

Alabama.—State ex rel. Collman v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; State v. Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92.

Arkansas.—Wasson v. Planters' Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141; Ex parte Byles, 93 Ark. 612, 126 S. W. 94, 37 L.R.A.(N.S.) 774, writ of error dismissed in 225 U. S. 717, 56 L. ed. 1270, 32 S. Ct. 836; Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L.R.A. 353.

California. — Veterans' Welfare Bd. v. Jordan, 189 Cal. 124, 208 P. 284, 22 A.L.R. 1515; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; Re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am. St. Rep. 138; Robinson v. Southern P. Co. 105 Cal. 526, 38 P. 94, 722, 28 L.R.A. 773.

Colorado.—Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907.

Delaware. — Clendaniel v. Conrad, 3 Boyce. 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

Florida.—Louis K. Liggett Co. v. Lee, 109 Fla. 477, 149 So. 8, citing R. C. L.; McSween v. State Live Stock Sanitary Bd. 97 Fla. 759, 122 So. 239, 65 A.L.R. 508; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A. (N.S.) 794, 19 Ann. Cas. 235; State ex rel. Lamar v. Dillon, 32 Fla. 545, 14 So. 383, 22 L.R.A. 124.

Illinois.—Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; People ex rel. Honore v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371.

Iowa.—Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

Kansas.—State ex rel. White v. Wyandotte County, 140 Kan. 744, 39 P. (2d) 286, citing R. C. L.; Cashin v. State Highway Commission, 137 Kan. 744, 22 P. (2d) 939, citing R. C. L.

Kentucky. — Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454.

Maryland. — Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; Daly v. Morgan, 69 Md. 460, 16 A. 287, 1 L.R.A. 757.

Massachusetts. — Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Com. v. Hana, 195 Mass. 262, 81 N. E. 149, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

Minnesota. — State v. Duluth Gas & Water Co. 76 Minn. 96, 78 N. W. 1032, 57 L.R.A. 63.

Mississippi.—American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 575, L.R.A.1918B, 446, Ann. Cas. 1916D, 127.

Missouri.—Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274.

Nebraska.—Re Groff, 21 Neb. 647, 33 N. W. 426, 59 Am. Rep. 859.

New Mexico.—State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136.

New York.—People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 76 A.L.R. 514; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499.

North Carolina. — American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475, 36 A.L.R. 680.

North Dakota.—State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207.

Oklahoma.—State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Comanche Light & P. Co. v. Nix, 53 Okla. 220, 156 P. 293, citing R. C. L.

Oregon.—Standard Lumber Co. v. Pierce, 112 Or. 314, 228 P. 812, citing R. C. L.

Pennsylvania.—Titusville Iron Works v. Keystone Oil Co. 122 Pa. 627, 15 A. 917, 1 L.R.A. 361.

South Carolina.—State v. Johnson, 76 S. C. 39, 56 S. E. 544, 11 Ann. Cas. 721; Utsey v. Hiott, 30 S. C. 360, 9 S. E. 338, 140 Am. St. Rep. 910.

Tennessee. — Rhinehart v. State, 121 Tenn. 420, 117 S. W. 598, 17 Ann. Cas. 254.

Texas.—Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484; Dallas v. Love (Tex. Civ. App.) 23 S. W. (2d) 431, affirmed in 120 Tex. 351, 40 S. W. (2d) 20, citing R. C. L.

Utah.—Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1260.

Wisconsin.—State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 117 N. W. 686, 19 L.R.A. (N.S.) 326; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

Annotation: Ann. Cas. 1916D, 10.

Although a statute bad in part is not necessarily void in its entirety, the valid portion cannot stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

20 **United States.**—Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 30 S. Ct. 481, 27 L.R.A.(N.S.) 493, 18 Ann. Cas. 1103; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33; Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 S. Ct. 677; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 S. Ct. 110; Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 158 U. S. 601, 39 L. ed. 1108, 15 S. Ct. 912; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962; Allen v. Louisiana, 103 U. S. 80, 26 L. ed. 318.

Alabama.—State ex rel. Collman v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; State v. Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92.

Arkansas.—Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Ex parte Byles, 93 Ark. 612, 126 S. W. 94, 37 L.R.A.(N.S.) 774, writ of error dismissed in 225 U. S. 717, 56 L. ed. 1270, 32 S. Ct. 836; Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L.R.A. 353.

California.—Pasadena City High School Dist. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408; Re Johnson, 139 Cal. 532, 73 P. 424, 96 Am. St. Rep. 161; Re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am. St. Rep. 138; Robinson v. Southern P. Co. 105 Cal. 526, 38 P. 94, 722, 28 L.R.A. 773.

Colorado.—Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907.

Connecticut.—Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324.

Florida.—State ex rel. Atty. Gen. v. Hilburn, 70 Fla. 55, 69 So. 784, citing R. C. L.; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; State v. Tampa Waterworks Co. 56 Fla. 858, 47 So. 358, 19 L.R.A.(N.S.) 183; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558.

Idaho.—Ferbrache v. Drainage Dist. 23 Idaho, 85, 128 P. 553, 44 L.R.A.(N.S.) 538, Ann. Cas. 1915C, 43; Ballentine v. Willey, 3 Idaho, 496, 31 P. 994, 95 Am. St. Rep. 17.

Illinois.—People ex rel. Barrett v. Union Bank & T. Co. 362 Ill. 164, 199 N. E. 272, 104 A.L.R. 1090; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398, appeal dismissed in 289 U. S. 711, 77 L. ed. 1465, 53 S. Ct. 794; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772; Polkin v. Rand, McN. & Co. 259 Ill. 561, 95 N. E. 693, Ann. Cas. 1912B, 471; People ex rel. Honore v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992.

Indiana.—Election Comrs. v. Knight, 187 Ind. 108, 117 N. E. 565, 650, citing R. C. L.;

parts of a statute enough must remain to warrant the inference that the legislature would have enacted the valid provisions separately is one which is particularly applicable to a statute adopted by referendum.[1]

The principles involved in determining severability on the basis of the legislative intention comprise the familiar rule that if the parts of a law are divisible and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts;[2] the portion which remains after deletion

State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L.R.A. 58; State v. Denney, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65.

Iowa.—Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; Flannigan v. Jepson, 177 Iowa, 393, 158 N. W. 641, L.R.A.1918E, 548; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489.

Kansas.—Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422.

Kentucky.—Kirchdorfer v. Tincher, 204 Ky. 366, 264 S. W. 766, 40 A.L.R. 801; Sinking Fund Comrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454.

Louisiana.—State v. Lange, 168 La. 958, 123 So. 639, 67 A.L.R.1447; Gretna v. Bailey, 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566.

Maine.—State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Soper v. Lawrence Bros. Co. 98 Me. 268, 56 A. 908, 99 Am. St. Rep. 397, affirmed in 201 U. S. 359, 50 L. ed. 788, 26 S. Ct. 473.

Maryland.—State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.(N.S.) 344, Ann. Cas. 1913A, 1247; Daly v. Morgan, 69 Md. 460, 16 A. 287, 1 L.R.A. 757.

Massachusetts.—Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 102 N. E. 619, 46 L.R.A.(N.S.) 1196; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

Michigan.—Atty. Gen. ex rel. Conely v. Detroit, 78 Mich. 545, 44 N. W. 388, 7 L.R.A. 99, 18 Am. St. Rep. 458.

Minnesota.—State v. Duluth Gas & Water Co. 76 Minn. 96, 78 N. W. 1032, 57 L.R.A. 63; Davis v. St. Louis County, 65 Minn. 310, 67 N. W. 997, 33 L.R.A. 432, 60 Am. St. Rep. 475; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. Rep. 663.

Mississippi.—American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 575, L.R.A.1918B, 446, Ann. Cas. 1916D, 127.

Nebraska.—State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839; Re Groff, 21 Neb. 647, 33 N. W. 426, 59 Am. Rep. 859.

New Jersey.—Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; Johnson v. State, 59 N. J. L. 535, 37 A. 949, 39 A. 646, 38 L.R.A. 373.

New Mexico.—State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136.

New York.—Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499.

North Dakota.—Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A. (N.S.) 997, Ann. Cas. 1916C, 207.

Oklahoma.—State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Comanche Light & P. Co. v. Nix, 53 Okla. 220, 156 P. 293, citing R. C. L.; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008.

Pennsylvania.—Rothermel v. Meyerle, 136 Pa. 250, 20 A. 583, 9 L.R.A. 336; Titusville Iron Works v. Keystone Oil Co. 122 Pa. 627, 15 A. 917, 1 L.R.A. 361.

South Carolina.—State v. Johnson, 76 S. C. 39, 56 S. E. 544, 11 Ann. Cas. 721; Utsey v. Hiott, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910.

South Dakota.—Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954.

Tennessee.—Rhinehart v. State, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254.

Utah.—Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; North Tintic Min. Co. v. Crockett, 75 Utah, 259, 284 P. 328, citing R. C. L.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

West Virginia.—Hodges v. Public Serv. Commission, 110 W. Va. 649, 159 S. E. 834, citing R. C. L.; State v. Edwards, 95 W. Va. 599, 122 S. E. 272, citing R. C. L.

Wisconsin.—State ex rel. Wisconsin Teleph. Co. v. Henry, 218 Wis. 302, 260 N. W. 486, 99 A.L.R. 1267; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 117 N. W. 686, 19 L.R.A.(N.S.) 326; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

Wyoming.—McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.

Annotation: 95 Am. St. Rep. 28; Ann. Cas. 1916D, 10.

A provision of a statute inherently unobjectionable cannot be deemed separable unless it appears that the legislature intended that provision to stand in case others included in the act and held bad should fall. Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323.

Courts have no authority to make a law by holding invalid a provision of a statute and upholding the remainder if, by so doing, they would accomplish a result which would not have been sanctioned by the legislature. Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24.

[1] Gretna v. Bailey, 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566.

[2] Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; People v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Leavitt v. Morris, 105 Minn. 170, 117 N. W. 393, 17 L.R.A.(N.S.) 984, 15 Ann. Cas. 961; Davis v. St. Louis County, 65 Minn. 310, 67 N. W. 997, 33 L.R.A. 432, 60 Am. St. Rep. 475; State ex rel. Johnson v. Chicago, B. & Q. R. Co. 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661; Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324; Comanche Light & P. Co. v. Nix, 53 Okla. 220, 156 P. 293, citing R. C. L.; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207; Riggins v. District Ct. 89 Utah, 183, 51 P. (2d) 645, citing R. C. L.; North Tintic Min. Co. v. Crockett, 75 Utah, 259, 284 P. 328, citing R. C. L.; Hodges v. Public Serv. Commission, 110 W. Va. 649, 159 S. E. 834, citing R. C. L.

Annotation: 17 L.R.A.(N.S.) 984.

The invalidity of part of the scheme for which a state bond issue is authorized will not defeat the project unless the whole scheme is so intimately connected as to indicate that the legislature would not have adopted it in the absence of the unconstitutional part. Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 P. 678, 22 A.L.R. 1531.

[3] Ballentine v. Willey, 3 Idaho, 496, 31 P. 994, 95 Am. St. Rep. 17; State v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839; Comanche Light & P. Co. v. Nix, 53 Okla. 220, 156 P. 293, citing R. C. L.

[4] Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

[5] State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954.

[6] Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Koch v. North Ave. R. Co. 75 Md. 222, 23 A. 463, 15 L.R.A. 377; Davis v. White (Tex. Civ. App.) 260 S. W. 138, citing R. C. L.

[7] State ex rel. Wisconsin Teleph. Co. v. Henry, 218 Wis. 302, 260 N. W. 486, 99 A.L.R. 1267.

[8] Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 S. Ct. 988; Re Mahoney, 133 Cal. 180, 65 P. 389, 85 Am. St. Rep. 155; Westlake v. Merritt, 85 Fla. 28, 95 So. 662, citing R. C. L. (concurring opinion); Harper v. Galloway, 58 Fla. 255, 51 So. 226, 26 L.R.A.(N.S.) 794, 19 Ann. Cas. 235; State v. Patterson, 50 Fla. 127, 39 So. 398, 7 Ann. Cas. 272; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; People ex rel. Phillips v. Strassheim, 240 Ill. 279, 88 N. E. 821, 22 L.R.A.(N.S.) 1135; State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 575, 22 N. E. 778, 6 L.R.A. 579; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140; Comanche Light & P. Co. v. Nix, 53 Okla. 220, 156 P. 293, citing R. C. L.

must express the legislative will independently of the void part.[3] Thus, if the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portions.[4] On the other hand, if sufficient remains to effect the object of the statute without the aid of the invalid portion, the latter only should be rejected.[5] Thus, where a statute provides for two distinct objects, it has been held that it may be sustained as to one of them although the provisions relating to the other may be unconstitutional and void.[6] Moreover, the elimination of even material provisions in a statute as enacted because of their invalidity does not render the remaining valid provisions thereof ineffective if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone.[7]

In any case where it is sought to apply parts of an act after elimination of invalid portions, the test of what will result from partial application must be considered to see if a law consistent with the legislative intent will be put into effect; and where the enforcement of portions of a statute after the elimination of unconstitutional sections would produce results not contemplated or desired by the legislature, the entire statute is usually held to be inoperative and void.[8]

Frequently, the giving of effect to the remaining valid portions of a statute after elimination of invalid parts thereof is in accordance with the general intent of the legislature.[9] In many instances the legislature may be presumed to have intended that the other provisions of a statute should be enforced, although the defective portions should be eliminated.[10] Thus, it has been held that the general intention of the legislature may be to separate the teaching of white and of colored children. This being so, it does not necessarily follow that it would not have enforced the separation as far as possible though unable to make it effective under all circumstances. Accordingly, some of the provisions with that end in view may be eliminated from such a statute without impairing the others.[11]

§ 156. —Effect of Saving Clause.—Occasionally, the legislature expressly states its will that the valid provisions of a statute shall be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is generally carried out by the courts.[12] The operation of such a saving clause can be illustrated most graphically by a few examples. Thus, if the act contains a clause providing that the invalidity of part of the act shall not affect the balance, the possible unconstitutionality of a provision of a statute punishing wilful failure or refusal to pay on demand for fruit purchased by a cash dealer from growers which makes the mailing of such a demand conclusive evidence that such demand was made does not affect the validity of other provisions of the act;[13] a provision in a statute imposing a privilege tax on motor vehicles operated

9 People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A. (N.S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

10 Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537.

11 Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33.

12 Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327; Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319; Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548, 81 L. ed. 1279, 57 S. Ct. 883, 109 A.L.R. 1293; Sonzinsky v. United States, 300 U. S. 506, 81 L. ed. 772, 57 S. Ct. 554; Louis K. Liggett Co. v. Lee, 288 U. S. 517, 77 L. ed. 929, 53 S. Ct. 481, 85 A.L.R. 699; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Utah Power & Light Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596 (recognizing rule); Weller v. New York, 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 839, 43 S. Ct. 479; Keller v. Potomac Electric Power Co. 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737, 34 S. Ct. 372; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314; Wasson v. Planters' Bank & T. Co. 188 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Snetzer v. Gregg, 129 Ark. 542, 196 S. W. 925, L.R.A.1917F, 999; Ingels v. Riley, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A.L.R. 1; People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331; Bacon Serv. Corp. v. Huss, 199 Cal. 21, 248 P. 235 (writ of error dismissed in 275 U. S. 507, 72 L. ed. 397, 48 S. Ct. 158) citing R. C. L.; Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Louis K. Liggett Co. v. Lee, 109 Fla. 477, 149 So. 8, citing R. C. L.; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Miles v. Department of Treasury, — Ind. —, 193 N. E. 855, 97 A.L.R. 1474, superseded in — Ind. —, 199 N. E. 372, 101 A.L.R. 1359; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 575, L.R.A.1918B, 446, Ann. Cas. 1916D, 127; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; People ex rel. Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109, 15 A.L.R. 1319; State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680, 39 A.L.R. 1169; Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561; Standard Lumber Co. v. Pierce, 112 Or. 314, 228 P. 812, citing R. C. L.; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

Annotation: 73 L. ed. 287 et seq.; Ann. Cas. 1916D, 16.

13 People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.

upon the state highways, which is invalid as beyond the legislative power, as exempting vehicles so taxed from further taxation according to value and other portions of the statute imposing an annual license fee upon motor vehicles for the privilege of operating in the state containing a provision purporting to appropriate a portion of the funds collected to cities for municipal purposes, in violation of the state Constitution, will not invalidate the remainder of the act;[14] the unconstitutionality as to partnerships of a statute assuming to tax the privilege of doing business in the state as a corporation, business trust, or partnership does not render the statute inoperative as to corporations.[15] The principle also controls to salvage the balance of statutes where each of them contains a saving clause notwithstanding the invalidity or possible invalidity of portions of such statutes, as, for example, a provision exempting electricity used in pumping water for irrigation, in a statute taxing the generation of electricity for sale;[16] continuing liability of bank stockholders for existing bank debts and for the issuance of certificates of indebtedness to owners of frozen deposits, added by an amendment to a bill providing for conversion of double liability bank stock into nonassessable and single liability stock;[17] classifying taxpayers in an income tax law;[18] compelling submission to arbitration of differences which may arise between owners of cattle and the livestock sanitary board and its officers in an act for the elimination of cattle fever tick;[19] creating monopolistic conditions in a statute relating to the business of manufacture, sale, and distribution of ice;[20] canceling the prices established for a market area if the cancelation is requested by a majority of the producers and distributors in such area, in an act establishing a milk commission with power to create within the state natural market areas and to fix the minimum and maximum prices to be charged for milk and cream therein.[1]

Such saving clauses are recognized as valid and are not an invalid delegation of legislative authority or a presentation of an inconsistent alternative.[2]

The principles which underlie the application of the saving clause have been well established. In the absence of a legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intends the act to be effective as an entirety.[3] The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded to statutes, but an opposite presumption of separability.[4] The Supreme Court has stated that a saving clause clearly evidences

14 Ingels v. Riley, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A.L.R. 1.

15 Corn v. Fort, 170 Tenn. 377, 95 S. W. (2d) 620, 106 A.L.R. 647.

16 Utah Power & Light Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548.

17 Wasson v. Planters' Bank & T. Co. 90 Ark. 343, 65 S. W. (2d) 528, 90 A.L.R. 141.

18 Miles v. Department of Treasury, — Ind. —, 199 N. E. 372, 101 A.L.R. 1359, superseding — Ind. —, 193 N. E. 855, 97 A.L.R. 1474.

19 McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 598.

20 Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

1 Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. ed. 835, 57 S. Ct. 549.

2 Snetzer v. Gregg, 129 Ark. 542, 196 S. W. 925, L.R.A.1917F, 999.

Annotation: 73 L. ed. 288, 289.

3 Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Riccio v. Hoboken, 69 N. J. L. 649, 55 A. 1109, 63 L.R.A. 485.

4 Charles C. Steward Mach. Co. v. Davis, 301 U. S. 548, 81 L. ed. 1279, 57 S. Ct. 883, 109 A.L.R. 1293; Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596.

a legislative intention not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the statute which would render them invalid should not be indulged.[5]

The saving clause is not absolute, for the reason that it is merely an aid to interpretation, and not an inexorable command.[6] It is to be given a reasonable interpretation and does not operate to save provisions which clearly would not have been inserted except upon the supposition that the entire act was valid.[7] The courts have steadfastly declared that the presumption so created is rebuttable although it must be overcome by considerations which make evident the inseparability of the provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remained, in order to defeat the entire act.[8] When the presumption of separability which is created by such a provision in a statute is overcome by a showing of the indivisible character of the act in spite of the provision, the entire act must fall with any invalid portion.[9]

Certain criteria of a singleness of purpose of the statutes involved may indicate the futility of a saving clause to salvage portions of an act from an invalidity which permeates other sections. A legislative declaration that the invalidity of a portion of a statute shall not affect the remainder in no way alters the rule that in order for a part of a statute to be upheld as separable, where another part is unconstitutional, they must not be mutually dependent on one another.[10] For example, in view of the close interrelation of wages in the bituminous coal-mining industry and the price of coal, the price-fixing provisions of the Bituminous Coal Conservation Act of 1935 must be regarded as so inseparably connected with the labor provisions that the invalidity of the

[5] Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285.

[6] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323.

Annotation: 73 L. ed. 290.

The presumption of separability of the provisions of the Bituminous Coal Conservation Act of 1935 created by a legislative declaration that the invalidity of any portion of the statute shall not affect the remainder is not aided by a provision therein that no producer shall, by reason of his acceptance of the code of regulations therein provided for or of the drawback of taxes allowed to producers accepting such regulations, be held to be precluded or estopped from contesting the constitutionality of any provision of such code. Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

[7] Mazurek v. Farmers' Mut. F. Ins. Co. 320 Pa. 33, 181 A. 570, 102 A.L.R. 798.

[8] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Utah Power & L. Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596.

[9] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 S. Ct. 453; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; Adams v. Spillyards, 187 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; People ex rel. Atty. Gen. v. Sperry & H. Co. 197 Mich. 532, 164 N. W. 503, L.R.A. 1918A, 797; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; Mazurek v. Farmers' Mut. F. Ins. Co. 320 Pa. 33, 181 A. 570, 102 A.L.R. 798.

Annotation: 73 L. ed. 289.

[10] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

The invalidity of the Future Trading Act of August 24, 1921, § 4, with its tax penalty to secure compliance with the regulations of boards of trade prescribed by that act, and of the regulations affected by the so-called tax invalidates all the regulations, that section being so interwoven with the regulations that they cannot be separated, notwithstanding the direction in § 11 of the act, that if any provision thereof or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby. This latter section did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations which it does not contain. This is legislative work beyond the power and function of the court. Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 S. Ct. 453.

labor provisions renders the price-fixing provisions inoperative, notwithstanding the saving clause.[11] Similarly, the exception of groups from the provisions of a statute requiring wholesale produce dealers to obtain licenses and give bond is such a vital part of the statute that if it is invalid, the whole statute falls, notwithstanding such a clause.[12] Moreover, the fact that certain provisions of a statute are found in the same section with an invalid provision is significant of a legislative intention that if the latter cannot be given effect, the former shall not be operative.[13] Consequently, the effectiveness of the act to carry out, without its invalid portions, the original legislative intent in enacting it is still the true test of separability. A saving clause will not be given effect where the invalid provisions affect the dominant aim of the whole statute.[14] Invalid portions of the Railroad Retirement Act for that reason carry the whole statute down with them.[15] On the other hand, if the statute is susceptible of being given effect even with possible omissions of portions, the saving clause controls. The provisions of the Alabama Unemployment Compensation Act for the taxation of employers for the purposes of the act are separable from those providing for the taxation of employees for such purposes, the statute containing a separability clause and there being nothing in the language of the statute to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of such a clause.[16]

The general rule is equally applicable to clauses contained in municipal ordinances in most states, although in some jurisdictions the application of this principle has been denied to such ordinances.[17]

§ 157. Invalidity of Inducement.—One of the tests used to determine whether a statute is or is not severable is whether the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part held to be unconstitutional.[18] If the valid and the invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.[19] This test is

[11] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

[12] State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

[13] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

[14] Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758.

[15] Ibid.

[16] Carmichael v. Southern Coal & Coke Co. 301 U. S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327.

[17] Annotation: 73 L. ed. 289.

[18] Utah Power & L. Co. v. Pfost, 286 U. 165, 76 L. ed. 1038, 52 S. Ct. 548; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 S. Ct. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; Union Bank & T. Co. v. Blan, 229 Ala. 180, 155 So. 612, citing R. C. L.; Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; State v. Deal, 24 Fla. 293, 4 So. 899, 12 Am. St. Rep. 204; Shellabarger Elevator Co. v. Illinois C. R. Co. 278 Ill. 333, 116 N. E. 170, L.R.A.1917E, 1011; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, citing R. C. L.; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L.R.A. 210, 42 Am. St. Rep. 613; American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475, 36 A.L.R. 680; Becker County Sand & Gravel Co. v. Wosick, 62 N. D. 740, 245 N. W. 454, citing R. C. L.; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L.R.A. 838; Trustees, Exrs' & Securities Ins. Corp. v. Hooton, 53 Okla. 530, 157 P. 293, L.R.A.1916E, 602; Re Gross Production Tax, 53 Okla. 24, 154 P. 362, L.R.A.1916F, 141, overruled on another point in Re Skelton Lead & Zinc Co's Gross Production Tax, 81 Okla. 134, 197 P. 495; White v. Maverick County Water Control & Improv. Dist. (Tex. Com. App.) 35 S. W. (2d) 107, citing R. C. L.; Nathan v. Spokane County, 35 Wash. 26, 76 P. 521, 65 L.R.A. 336, 102 Am. St. Rep. 888.

[19] Union Bank & T. Co. v. Blan, 229 Ala. 180, 155 So. 612, citing R. C. L.; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; State ex rel. Atty. Gen. v. Hilburn, 70 Fla. 55, 69 So. 784, citing R. C. L.; Ballentine v. Willey, 3 Idaho, 496, 31 P. 994, 95 Am. St. Rep. 17; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, citing R. C. L.;

merely a means of ascertaining and carrying out the presumed intention of the legislature. If it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone.[20] Thus, where those provisions of an old-age pension law which are invalid as an attempt to confer judicial powers on the board of county commissioners were enacted apparently for the purpose of giving such board control over the administration of the act and the elimination of such invalid provisions would leave the control in the hands of the county judge, the entire act must be held invalid.[1] A statute providing for the creation of a board of examiners of plumbers in cities, with authority to examine applicants for plumbers' licenses, formulate rules regulating the work of plumbing, and inspect plumbing work, falls in its entirety when the provision for examination and licensing of applicants proves to be unconstitutional if it appears that the legislature would not have passed the act with such provision eliminated.[2] This principle has also been applied in cases of schemes of legislation for a particular purpose created by the enactment of a law specially referring to the subject and to other laws required for a complete plan. If the special enactment is the inducing provision and is unconstitutional, it has been held that the whole is inefficient and invalid.[3]

§ 158. Elimination of Nonessential Portions.—Another rule to which recourse is had in determining the severability of statutes is that nonessential portions may be eliminated and effect given to the remainder.[4] Thus, merely incidental details may be stricken out without impairing the general scheme of the enactment.[5] Moreover, the unconstitutionality of the portion of a stat-

State ex rel. O'Shea v. Farmers Irrig. Dist. 98 Neb. 239, 152 N. W. 372, L.R.A.1915E, 687, affirmed in 244 U. S. 325, 61 L. ed. 1168, 37 S. Ct. 630; State v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L.R.A. 740, 93 Am. St. Rep. 431; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140; State v. Candland, 36 Utah, 406, 104 P. 285, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834; State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67; State ex rel. Husting v. State Convassers, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916D, 159; State v. Frear, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Little Chute v. Van Camp, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

Annotation: Ann. Cas. 1916D, 10.

[20] Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, citing R. C. L.; Low v. Rees Printing Co. 41 Neb. 127, 59 N. W. 362, 24 L.R.A. 702, 43 Am. St. Rep. 670; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L.R.A. 210, 42 Am. St. Rep. 613.

The invalidity, under the Fifteenth Amendment to the United States Constitution, of the exemption from the literacy test prescribed by the 1910 Amendment of Oklahoma Const. Art. 3, § 1, as a condition to voting, which that amendment makes in favor of persons who, on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government or who at that time resided in some foreign nation, and their lineal descendants, renders invalid the literacy test itself. Guinn v. United States, 238 U. S. 347, 59 L. ed. 1340, 35 S. Ct. 926, L.R.A. 1916A, 1124.

[1] Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907.

[2] Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

[3] Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L.R.A.(N.S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

[4] People ex rel. Moll v. Danziger, 238 Mich. 39, 213 N. W. 448, 52 A.L.R. 136; McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A. 1917C, 528; Becker County Sand & Gravel Co. v. Wosick, 62 N. D. 740, 245 N. W. 454, citing R. C. L.; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.

Annotation: 140 Am. St. Rep. 915.

[5] People's Nat. Bank v. Marye, 191 U. S. 272, 48 L. ed. 180, 24 S. Ct. 68; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94; Newman v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; State ex rel. Benson v. Petterson, 180 Minn. 366, 230 N. W. 830, citing R. C. L.; Leavitt v. Morris, 105 Minn. 170, 117 N. W. 393, 17 L.R.A.(N.S.)

ute which applies to persons in one classification does not render invalid another portion which contains a complete classification in itself.[6]

The principle involved is in effect a restatement of the fundamental doctrine and may be of little practical value as a test, since the primary difficulty may remain as to what portions of a statute are nonessential. It may be helpful to note, however, as practical illustrations of the application of this principle, that the courts have held separable a provision as to the time of meeting of presidential electors in a statute providing for the choice of such electors;[7] a provision of an act prescribing the method of permitting electors to designate their choice of a candidate for the United States Senate as not dependent for its validity on other provisions requiring an oath and pledge on the part of candidates for that office;[8] a provision in a civil service law disqualifying for office persons who should be convicted of violating such law;[9] a provision that an act should be submitted to the vote of the people before it should take effect;[10] a general provision conferring suffrage upon women in which, in some particulars which could be segregated, the legislature exceeded its authority;[11] a section prohibiting the charging of interest or discount in excess of 8 per cent per annum upon the loan, use, or forbearance of money, goods, or things in action, in an act providing for the licensing and regulation of the business of making small loans at a greater rate of interest than 8 per cent per annum;[12] a provision in a married woman's property law requiring the signature of a husband to a deed by his wife;[13] and an appropriation to guarantee payment of interest in a statute establishing a department for farm loans.[14]

The principle is especially applicable in tax statutes.[15] Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid.[16] The rule thus applies to a provision in a tax law that taxes should be paid in gold;[17] a provision for ad valorem duties in a statute relating generally to taxes;[18] a provision authorizing state coupons to be received for taxes;[19] a provision as to the mode of assessment;[20] a clause providing for

984, 15 Ann. Cas. 961; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528; Becker County Sand & Gravel Co. v. Wosick, 62 N. D. 740, 245 N. W. 454, citing R. C. L.; State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E, 1324; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State ex rel. Cronkhite v. Bolden, 193 Wis. 145, 211 N. W. 916, 214 N. W. 460, 57 A.L.R. 1218.

Annotation: Ann. Cas. 1916D, 33 et seq., citing many examples.

The invalidity of a provision as to fees will not render void an entire statute regulating employment agencies. Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522.

[6] Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

[7] McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587.

[8] State v. Blaisdell, 18 N. D. 55, 118 N. W. 141, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741.

[9] People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775; State ex rel. Buell v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L.R.A.(N.S.) 480.

Annotation: 34 L.R.A.(N.S.) 484.

[10] Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

[11] Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772.

[12] State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574.

[13] Maclay v. Love, 25 Cal. 367, 85 Am. Dec. 133.

[14] Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

[15] Annotation: Ann. Cas. 1916D, 87 et seq.

[16] Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495.

[17] Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100.

[18] Rainey v. United States, 232 U. S. 310, 58 L. ed. 617, 34 S. Ct. 429.

[19] McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 S. Ct. 134.

[20] Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 S. Ct. 174.

an invalid exemption of certain kinds of property;[1] and provisions in estate tax acts as to apportionment,[2] in transfer tax acts as to rate,[3] in corporation and motor vehicle tax acts for unconstitutional purposes,[4] in a tax sales statute for satisfaction for less than the amount originally assessed,[5] and for the payment of delinquent taxes in instalments.[6] A statute which provided that every grand jury should consist of twelve persons and that the assent of eight of them should be sufficient to find an indictment has been held valid in so far as it provides that the jury may consist of twelve persons, although the clause requiring the assent of only eight is unconstitutional and void.[7] Similarly, the invalidity of a provision allowing a verdict by a majority of the jury, in a statute concerning condemnation proceedings, does not make the whole statute void.[8] Other details in procedural laws have been stricken out and the remainder of the statute held valid. Thus, a law prohibiting injunctions in industrial disputes does not render invalid the portions of the statute conferring the equitable power of injunction on the state courts of first instance of general jurisdiction.[9] Similarly, a section of a statute providing for review in court of the order of a public utilities commission, fixing rates for a public service corporation, is not rendered wholly void by the inclusion in it of an invalid provision for ultimate appeal from a court order to the Supreme Court of the United States for review.[10] The unconstitutionality of a provision of a mechanics' lien law giving a materialman who under a contract with the lessee has reconstructed, altered, or repaired a building or other improvement or fixture or furnished material for that purpose the right to remove it does not affect the validity of other provisions of the law, where, with such unconstitutional provision stricken out, the statute is a complete and valid act giving full and proper rights and remedies to mechanics and materialmen.[11]

Although a statute provides that in certain cases the widow or next of kin may nominate an administrator and that in counties of a specified population the public administrator must be appointed, it has been held that if the latter provision is unconstitutional as special legislation, it may be disregarded and effect given to the rest of the statute, and the widow or next of kin be permitted to nominate an administrator.[12] This principle has also been applied to statutes regulating insane asylums,[13] the commitment of minor children to reformatories,[14] the recovery of money expended for books for nonresident pupils in a statute providing for free schoolbooks,[15] the purchasing of schoolbooks,[16] the employment of children,[17] the qualifications of barbers,[18] the

1 Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469.
Annotation: Ann. Cas. 1916D, 88.

2 Knowles's Estate, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086.
Annotation: Ann. Cas. 1916D, 89.

3 City Bank Farmers' Trust Co. v. New York C. R. Co. 253 N. Y. 49, 170 N. E. 489, 69 A.L.R. 940.

4 Hunter's Estate, 97 Colo. 289, 49 P. (2d) 1009, 101 A.L.R. 1202.

5 State ex rel. Matteson v. Luecke, 194 Minn. 246, 260 N. W. 206, 99 A.L.R. 1053.

6 State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329.

7 Jacksonville, T. & K. W. R. Co. v. Adams, 33 Fla. 608, 15 So. 257, 24 L.R.A. 272.

8 Ibid.

9 Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375.

10 Keller v. Potomac Electric Power Co. 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445.

11 Masterson v. Roberts, 336 Mo. 158, 78 S. W. (2d) 856, 97 A.L.R. 862.

12 Strong v. Dignan, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225.

13 Murray v. Ramsey County, 81 Minn. 359, 84 N. W. 103, 51 L.R.A. 828, 83 Am. St. Rep. 379.

14 People v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139.

15 Macmillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288.

16 Polzin v. Rand, McN. & Co. 250 Ill. 561, 95 N. E. 623, Ann. Cas. 1912B, 471.

17 Re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

18 State v. Walker, 48 Wash. 8, 92 P. 775, 15 Ann. Cas. 257.

licensing of motor vehicle junk yards,[19] the licensing of horse-racing meets and the permitting of pari-mutuel betting,[20] the protection of theatre employees,[1] and the inspection of hotels.[2]

§ 159. Invalidity of Essential Portion of Statute.—The courts have frequently had occasion to decide that unconstitutional portions of general statutes are of sufficient importance to render the entire act unconstitutional. It may therefore be stated, as an additional test for determining whether the provisions of a statute are severable, that whenever the ruling feature of a law or an essential part from which the remaining portions take their cast is unconstitutional, the act must fall as a whole.[3] If the portions of a statute, rejected as in themselves unconstitutional, are not merely incidental and subordinate so that they can be stricken out without impairing the efficiency of the act, their invalidity will render the entire law void.[4] Hence, if a law has one or more invalid features pervading it as a whole, it must be regarded as an entirety and all be condemned as unconstitutional.[5]

It is clear that the invalidity of one section of a statute which is in material relation to its other portions so as to modify, restrict, or extend its application will cause the failure of such other portions also.[6] Thus, the invalidity of provisions of a sales tax law avowedly enacted for the purpose of providing an additional source of revenue for schools and for the relief of the unemployed, making appropriation of the proceeds of the tax to one or the other of these purposes dependent upon the determination of the state emergency relief commissions in counties of over 500,000 inhabitants and county boards in other counties, renders the whole invalid, since the elimination of the invalid provisions would result in imposing a tax to be paid into the state treasury, without any appropriation of its proceeds to its avowed purposes.[7] The same rule governs acts intended for general operation throughout the state, such as one conferring jurisdiction over juvenile offenders by which in some counties unconstitutional powers are conferred upon officers designated to execute the

19 State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

20 People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605.

1 O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1599.

2 State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909.
Annotation: 140 Am. St. Rep. 915.

3 Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; McPherson v. Blacker, 92 Mich. 377, 51 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587, affirmed in 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Nalley v. Home Ins. Co. 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283; Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686 (State Social Security Legislation); E. Fougera & Co. v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408; State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A. (N.S.) 339, Ann. Cas. 1913C, 774; State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 134 N. W. 300, 38 L.R.A.(N.S.) 526; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.

A proviso in a statute attempting to bring injuries in maritime work under state Workmen's Compensation Acts, which denies jurisdiction in such cases to the United States District Courts, falls when the main provision is declared invalid. Washington v. W. C. Dawson & Co. 264 U. S. 219, 68 L. ed. 646, 44 S. Ct. 302.

4 Malone v. Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.
Annotation: Ann. Cas. 1916D, 33 et seq., citing many examples.

5 Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

6 Lemke v. Farmers Grain Co. 258 U. S. 50, 66 L. ed. 458, 42 S. Ct. 244; Lemke v. Homer Farmers' Elevator Co. 258 U. S. 65, 66 L. ed. 467, 42 S. Ct. 250; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 190, citing R. C. L.; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, citing R. C. L.; Taylor v. Anderson, 40 Okla. 316, 137 P. 1183, 51 L.R.A.(N.S.) 731; State v. Swan, 7 Wyo. 166, 51 P. 209, 40 L.R.A. 195, 75 Am. St. Rep. 889.

7 Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398.

law. It has been held that such a law must stand or fall in its entirety.[8] A libel law requiring persons who have been libeled in a newspaper to give notice to the publisher so as to permit its publishing a retraction within a designated time has also been regarded as an entirety and void as a whole where the provisions prohibiting the recovery of actual damages are invalid. This conclusion was reached although the legislature could have provided that such publication of a retraction would protect the publisher from punitive, and yet not from actual, damages.[9] A statute allowing a taking of property in violation of constitutional provisions, while literally providing a substitute remedy for an action of trespass, is a legislative attempt to grant authority as well as to provide a remedy; and when the statute is held void as to the authority, it will not be uselessly severed to sustain the remedial provisions, but will be held void in its entirety.[10]

This test is distinct from that which demonstrates the invalidity of an entire statute whenever its inducement is unconstitutional.[11] Frequently a single part of an act may be of so great importance that although in itself it may not be an inducing cause for the enactment of the legislation, its invalidity may render the whole act void. Thus, an apportionment law must generally stand or fall in its entirety.[12] The same principle of inseparability was applied to an income tax law (prior to the Sixteenth Amendment to the Federal Constitution)[13] and to a schedule of rates established by a railroad commission.[14] Likewise, the invalidity as respects interstate commerce of the annual license tax imposed by a statute upon gasoline distributing stations or places of business, with a prohibition against further conduct of the business without making the required payment, renders the tax unenforceable as to the domestic commerce of a dealer who conducts his interstate and domestic business indiscriminately at the same stations and by the same agencies.[15]

§ 160. Elimination and Interpolation of Words and Clauses.—Considerable difficulties may arise in determining the sufficiency of the remaining portions of a statute which in any particular case have not been eliminated as unconstitutional. There is nothing in the general principles controlling the subject which prevents the severance and elimination not only of words, clauses, or sentences, but also of whole sections of laws.[16] The test is not whether they are contained in the same section, for the division of a statute into sections is frequently artificial, but whether the valid and the invalid sections are inseparably connected in substance[17] and whether after eliminating the invalid parts sufficient remains to carry out the legislative intent.[18]

Although words may be stricken out without impairing the validity of the balance of a statute, the converse cannot be done, and it is not permissible to interpolate omitted words.[19] It has been said that wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the legislature in order to make the provision which the legislature did put there constitutional, no instance of severance is made in any proper legal sense; nor is it, in any legal or logical sense, a proper limitation of the provisions which are in a statute by judicial construction. Such action by a court is nothing less than judicial legislation pure and simple, and clearly beyond its powers.[20] Thus, courts cannot by an act of judicial legislation add words of limitation to a statute expressed in general terms in order to sustain it, where its operation on the subject matter embraced in its terms is unconstitutional.[1]

§ 161. Striking Out Unconstitutional Exception.—One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent.[2] Instances of the application of this rule may be found in the case of

[8] Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 3 L.R.A.(N.S.) 564, 7 Ann. Cas. 821.

[9] Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422.

[10] Paine v. Savage, 126 Me. 121, 136 A. 664, 51 A.L.R. 1194.

[11] See supra, § 157.

[12] Ballentine v. Willey, 3 Idaho, 496, 31 P. 994, 95 Am. St. Rep. 17; Smith v. Thompson, 219 Iowa, 888, 258 N. W. 199, citing R. C. L.; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, citing R. C. L.

Annotation: 95 Am. St. Rep. 28.

[13] Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 158 U. S. 601, 39 L. ed. 1108, 15 S. Ct. 912.

[14] Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047.

[15] Bowman v. Continental Oil Co. 256 U. S. 642, 65 L. ed. 1139, 41 S. Ct. 606.

The failure to make an exception in favor of the transmission of messages for the Federal Government in a municipal ordinance imposing a license fee upon the doing of local business within the state by a telegraph company which has accepted the provisions of the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, U. S. Rev. Stat. §§ 5263, 5268, 47 U. S. C. A. §§ 1, 5), renders the whole tax invalid. Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 S. Ct. 116.

[16] Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1025, Ann. Cas. 1915B, 1136; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903.

[17] State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275.

[18] People v. Olsen, 222 Ill. 117, 78 N. E. 23, 113 Am. St. Rep. 371; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A. (N.S.) 1023, Ann. Cas. 1915B, 1136; Buffalo v. Till, 192 App. Div. 99, 182 N. Y. S. 418, citing R. C. L.; State v. Minneapolis & N. Elevator Co. 17 N. D. 23, 114 N. W. 482, 138 Am. St. Rep. 691; Crawford v. State, 116 Ohio St. 312, 156 N. E. 191, citing R. C. L.; Bishop v. Tulsa, 21 Okla. Crim. Rep. 457, 209 P. 228, 27 A.L.R. 1008.

[19] Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537; Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476.

[20] Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 34 So. 533, 62 L.R.A. 407, 95 Am. St. Rep. 476; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140.

Annotation: Ann. Cas. 1916D, 21.

[1] United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 S. Ct. 644; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A. (N.S.) 97; Frost v. Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468.

Annotation: Ann. Cas. 1916D, 20.

The text rule does not mean that regardless of questions of severability of portions of a statute, that where the statute is in and of itself of such a nature and so worded that it may be construed to be valid by a restrictive interpretation, such interpretation cannot be given. For the principle allowing such restrictive interpretation to sustain acts, see supra, § 100.

[2] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 S. Ct. 469; Spraigue v. Thompson, 118 U. S. 90, 30 L. ed. 115, 6 S. Ct. 988; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Gramling v. Maxwell (D. C.) 52 F. (2d) 256, citing R. C. L.; Chicago, M. & St. P. R. Co. v. Westby (C. C. A. 8th) 178 F. 619, 47 L.R.A.(N.S.) 97; State v. Pitts, 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; Pasadena City High School Dist. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; State v. Patterson, 50 Fla. 127, 39 So. 398, 7 Ann. Cas. 272; Reynolds v. State, 181 Ga. 547, 182 S. E. 917, citing R. C. L.; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927, 99 Am. St. Rep. 240; State v. Gantz, 124 La. 535, 50 So. 524, 24 L.R.A.(N.S.) 1072; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572; State ex rel. McDaniel v. Schramm, 272 Mo. 541, 199 S. W. 194, citing R. C. L.; Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L.R.A. 795; Utsey v. Hiott, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910; Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954; Daniel v. Larsen, 157 Tenn. 690, 12 S. W. (2d) 386, citing R. C. L.; Womack v. Carson, 123 Tex. 269, 70 S. W. (2d) 416, citing R. C. L.; Texas-Louisiana Power Co.

statutes prohibiting trusts or combinations to fix prices or restrict the production of articles of commerce, but excepting from the prohibitions all persons engaged in agriculture or horticulture;[3] statutes requiring all hawkers and peddlers to pay a license fee, but exempting all residents of a town who pay taxes amounting to twenty-five dollars on their stock of goods;[4] and statutes exempting designated cities from the operation of a general law.[5] In all such cases the exception of a particular group from the provisions of a general statute may have been a material consideration with the legislature in the passage of the act, and the courts may properly infer that it would not have been enacted if such group had not been excluded from its operation and protected from its provisions.[6]

The rule is equally well settled that exceptions may be stricken out when doing so does not defeat the general intent of the legislature.[7] Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain.[8] The general provisions of the statute are not invalidated unless it clearly appears that the provisions of the exception are so intimately and inherently related to, and connected with, the general provisions to which it relates that the legislature would not have enacted the latter without the former.[9] Thus, a statute purporting to impose a tax on insurance corporations based on the excess of premiums received over losses and expenses incurred and exempting the corporation from all other taxation, although it is void as to the exemption, has been decided to be valid and enforceable in other respects.[10] Similarly, where a subdivision exempting from a wheelage tax vehicles used for the purpose of selling or peddling the products of farm or garden is unconstitutional, it is not so connected with the rest of the act as to render the whole unconstitutional, and there is left a workable and constitutional statute.[11]

The Supreme Court has held that an invalid proviso which is added to an original statute by way of amendment at some time after the original enactment is to be regarded as separable. The invalid proviso cannot repeal by

v. Farmersville (Tex. Com. App.) 67 S. W. (2d) 235, citing R. C. L.; State v. Parmenter, 50 Wash. 164, 96 P. 1047, 49 L.R.A. (N.S.) 707; Nathan v. Spokane County, 35 Wash. 26, 76 P. 521, 65 L.R.A. 336, 102 Am. St. Rep. 888.
Annotation: Ann. Cas. 1916D, 26.

[3] Gramling v. Maxwell (D. C.) 52 F. (2d) 256, citing R. C. L.; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717.
An elimination of the unconstitutional portion of the Illinois Trust Act of June 20, 1893, which exempts agriculturists and livestock dealers from the provisions which prohibit combinations in restraint of trade, cannot be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid. Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431.

[4] Gramling v. Maxwell (D. C.) 52 F. (2d) 256, citing R. C. L.; State v. Mitchell, 97 Me. 66, 53 A. 887, 94 Am. St. Rep. 481.

[5] Gramling v. Maxwell (D. C.) 52 F. (2d) 256, citing R. C. L.; State ex rel. Johnson v. Chicago, B. & Q. R. Co. 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661.

[6] Gramling v. Maxwell (D. C.) 52 F. (2d) 256, citing R. C. L.; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927, 99 Am. St. Rep. 240.

[7] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235 (recognizing rule); Union Bank & T. Co. v. Blan, 229 Ala. 180, 155 So. 612, citing R. C. L.; State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489.
Annotation: Ann. Cas. 1916D, 26.

[8] Davis v. Wallace, 257 U. S. 478, 66 L. ed. 325, 42 S. Ct. 164.

[9] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; People v. Monterey Fish Products Co. 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186.

[10] Union Bank & T. Co. v. Blan, 229 Ala. 180, 155 So. 612, citing R. C. L.; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982, 98 Am. St. Rep. 572.

[11] Fairley v. Duluth, 150 Minn. 374, 185 N. W. 390, 32 A.L.R. 1258.

implication the requirement of the original statute which does not make any invalid discrimination, because an existing statute cannot be restricted by anything short of a constitutional enactment and an invalid proviso is not such an enactment.[12] It has also been held that a statute containing an unconstitutional exception which creates an invalid discrimination violating the Fourteenth Amendment to the Federal Constitution may be construed to be valid, where the exception amounts to the denial of a privilege, to extend such privilege to unfavored nonresidents. Thus, the fact that a statute providing compensation for resident workmen injured in other states while working under contracts entered into in the state where the statute was enacted discriminates in its operation against residents of other states working under similar contracts does not prevent the application of the statute creating the privilege for the former resident class to which it had been generally extended, but merely removes the invalid discrimination and automatically extends the operation of the privilege to the latter class as well.[13]

§ 162. Insufficient Title.—In accordance with the general principles governing the severability of statutes already discussed,[14] where the title of an act is insufficient, the rule is that the matters in the body of the statute not embraced are invalid, but the remainder of the act is not unconstitutional unless the parts are inextricably interwoven in the texture of the statute.[15]

2. Nature of Invalidity

§ 163. As to Part of Subject Matter.—Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts,[16] or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others.[17] Even though the provision is a single idea, a statute partially void because of inapplicablity to a portion of the subject matter covered will be treated as operative and enforceable as to the one portion and inoperative as to the other if the subject matter is of such a nature that it may be divided.[18] A statute which contains separate prohibitions of different acts or a prohibition applying to different classes of objects may

[12] Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.
As to amendatory acts generally, see supra, § 154.

[13] Quong Ham Wah Co. v. Industrial Acci. Commission, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190, writ of error dismissed in 255 U. S. 445, 65 L. ed. 723, 41 S. Ct. 373.

[14] See supra, §§ 152 et seq.

[15] Unity v. Burrage, 103 U. S. 447, 459, 26 L. ed. 405; State v. Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Ex parte Knight, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep. 191; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; Dixon v. Poe, 159 Ind. 492, 65 N. E. 518, 60 L.R.A. 308, 95 Am. St. Rep. 309; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 A. 462, 16 Ann. Cas. 874; Berry v. Baltimore & D. P. R. Co. 41 Md. 446, 20 Am. Rep. 69; Davis v. State, 7 Md. 151, 61 Am. Dec. 331; People v. De Blaay, 137 Mich. 402, 100 N. W. 598, 4 Ann. Cas. 919; Minsinger v. Rau, 236 Pa. 327, 84 A. 902, Ann. Cas. 1913E, 1324; Com. v. Moir, 199 Pa. 534, 49 A. 351, 53 L.R.A. 837, 85 Am. St. Rep. 801.
Annotation: Ann. Cas. 1916D, 28.

[16] Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 S. Ct. 70; John Woods & Sons v. Corl, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas. 423; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.
Annotation: Ann. Cas. 1916D, 19.

[17] Thurman v. Chicago, M. & St. P. R. Co. 254 Mass. 569, 151 N. E. 63, 46 A.L.R. 563.

[18] Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 S. Ct. 975; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 S. Ct. 33, affirming 123 Ky. 209, 94 S. W. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; Clark Implement Co. v. Wadden, 34 S. D. 550, 149 N. W. 424, L.R.A. 1915C, 414.
Annotation: Ann. Cas. 1916D, 19.

usually be severed without much difficulty.[19] Thus, provisions prohibiting discrimination between shippers may be severed from those prohibiting extortion in the matter of the rates of carriers.[20] A law may be unconstitutional so far as it affects natural persons, and yet as to corporations it may be valid.[1]

In some cases the statute cannot be severally construed so as to be given partial application consistent with its purpose as designed by the lawmakers, and if it cannot be made effective in accordance with the legislative intent in enacting it originally by limiting its operation to proper subject matter, the whole statute falls.[2] Moreover, where the same general clause of a statute appears to operate equally on all classes of cases, it seems that it is not proper judicially to limit the effect of the language to those who alone may be properly subject to statutory regulation. Thus, it has been held that a portion of a statute relating to foreign corporations which are not engaged in business in the state cannot be severed from the portion relating to such corporations that are engaged in business in the state, inasmuch as both classes are included in the same general clause.[3]

§ 164. Exclusion of Cases beyond Legislative Jurisdiction.—Another class of cases in which a statute may be in part valid and in part invalid consists of laws enacted by a legislature in general terms, covering not only persons and property as to which the legislature clearly has the right to make regulations, but apparently applying also to individuals and property protected from such legislation.[4] A law may be unconstitutional and void, in relation to particular cases, and yet valid to all intents and purposes in its application to other cases which differ from the former in material characteristics. In other words, where a statute has been passed by the legislature and, in relation to certain cases which it affects, some part of it is not within the competency of the

[19] State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275.
Annotation: 4 Ann. Cas. 281.
Where a statute prohibits different acts, such as the taking of fish and the sale of fish, it may be given effect as to one prohibited act although invalid as to the other. Territory v. Hoy Chong, 21 Haw. 39, Ann. Cas. 1915A, 1155.

[20] Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992.

[1] Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109.
The validity of a statute so far as it prohibits foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state is not affected by its possible invalidity as respects partnerships, where it is apparent on the face of the statute that the application of its provisions to corporations is severable from, and independent of its application to partnerships. Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 S. Ct. 206.
The possible invalidity as to individual carriers of the provisions of the Elkins Act of February 19, 1903, imputing to the carrier the acts, omissions, or failures of the officers and agents of such carrier, acting within the scope of their employment, does not affect the validity of so much of that act as imputes to corporate carriers the commission by officers and agents of such carriers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates. New York, C. & H. R. R. Co. v. United States, 212 U. S. 481, 53 L. ed. 613, 29 S. Ct. 304.

[2] Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 S. Ct. 964.
Annotation: Ann. Cas. 1916D. 20.

[3] Cella Commission Co. v. Bohlinger (C. C. A. 8th) 147 F. 419, 8 L.R.A.(N.S.) 537.

[4] Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278, writ of error dismissed in (U. S.) 41 L. ed. 1184, 17 S. Ct. 992; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Sault Ste. Marie Hospital v. Sharpe, 209 Mich. 684, 177 N. W. 297, citing R. C. L. (concurring opinion); Milwaukee Industrial School v. Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.
Legislative regulation of railway rates which is not confiscatory as to certain railroads is enforceable as against them, though it may be unenforceable as against another carrier, differently situated, because the rates prescribed may, as to it, be unreasonably low. Knott v. St. Louis, K. C. & C. R. Co. 230 U. S. 519, 57 L. ed. 1596, 33 S. Ct. 983; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 S. Ct. 975.

legislative power or is repugnant to some provision of the Constitution, such part may be adjudged void and of no avail, while all other parts of the act not obnoxious to the same objection may be upheld as valid and have the force of law.[5]

The courts in some instances by a restrictive construction have limited the effect of a statute to cases clearly within the field of legislative control.[6] This result which sustains portions of a law in and of themselves valid in their operation arises from the theory that a statute which is unsustainable in its literal terms because it is valid in some of its applications but not in others is to be read as though the latter were excepted from its operation.[7] For example, a state tax law which is general in its terms and on its face applies alike to all taxpayers may be restricted by the court so as to exempt from its operation stockholders in national banks. Such a statute would not for that reason be declared void as a whole, but should be given effect in reference to all persons embraced within the general language employed, with the exception of those outside the proper field of such legislation.[8] Such an application of the broad principle of restrictive construction seems to be difficult, for it has been said by the Supreme Court of the United States that an exception of a class constitutionally exempted cannot be read into general words merely for the purpose of saving what remains.[9] Where an act of Congress in attempting to give effect to the Fifteenth Amendment of the United States Constitution went beyond the purview of that amendment and denounced as a crime any act by which a voter might be deprived of his vote whether by race, color, or previous condition of servitude, or for other cause, the Supreme Court of the United States held that it was not possible to eliminate that part of the act which was invalid and retain the balance which might be within the power of Congress.[10]

§ 165. —Illustrative Cases of Exclusion.—The most frequent cases in which the field of legislation is restricted by implication comprise instances in which certain individuals are protected from legislative interference by reason of the operation of the clauses prohibiting the impairment of the obligation of contracts,[11] the passage of retrospective laws,[12] and encroachments by Congress and the state legislatures respectively on each other's domain.[13] Thus, an act

[5] Oglesby v. Pacific Finance Corp. 44 Ariz. 449, 38 P. (2d) 646, citing R. C. L.; Sault Ste. Marie Hospital v. Sharpe, 209 Mich. 684, 177 N. W. 297, citing R. C. L. (concurring opinion); Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262.

[6] See supra, § 100.

[7] Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.
In Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276, L.R.A.1915B, 247, Ann. Cas. 1915A, 772, it was held that the fact that in conferring the privilege of suffrage upon women, the legislature exceeded its constitutional power in some particulars did not destroy the act in toto, but such matters might be segregated and the statute uphold so far as it applied to offices the privilege of voting for which might legally be conferred upon women.

[8] Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Oglesby v. Pacific Finance Corp. 44 Ariz. 449, 38 P. (2d) 646, citing R. C. L.; State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903; Sault Ste. Marie Hospital v. Sharpe, 209 Mich. 684, 177 N. W. 297, citing R. C. L. (concurring opinion).

[9] United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 S. Ct. 644.

[10] United States v. Reese, 92 U. S. 214, 23 L. ed. 563.

[11] See Vol. 12, Subd. XI.

[12] Purdy v. Erie R. Co. 162 N. Y. 42, 56 N. E. 508, 48 L.R.A. 669.
See infra, § 366.

[13] State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903.
The validity of state statutes in so far as they impose liability upon a railway company for an injury to an employee engaged in interstate commerce, arising from the negligence of a coemployee, and modify the rule of contributory negligence, is not affected because such statutes also cover subjects dealt with by the Federal Safety Appliance Act of March 2, 1893, such as acts of negligence of railway companies in respect of their cars, roadbed, machinery, etc. Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 S. Ct. 606.

of the legislature may be unconstitutional so far as it purports to operate retrospectively[14] or to have retroactive application to past contracts,[15] or to the extent that it is found to impair the obligation of a contract, and yet it may be valid and constitutional in other respects and as applied to future cases.[16]

The general principle has also been applied to the large and important class of cases where state laws are partially invalid as interfering with interstate commerce. Such statutes have frequently been treated as severable and sustained to the extent of regulating commerce within the confines of the state.[17] The reverse case is where an act of Congress, while embracing subjects within its authority in regulating commerce, also includes subjects not within its constitutional power. If the two are so interblended in the statute that they are incapable of separation, the entire statute will be held to be repugnant to the Federal Constitution and nonenforceable.[18] For example, if a state law in terms is broad enough to apply to trusts and conspiracies of all persons, including those engaged in interstate commerce, it would be proper for the courts to limit such a statute by construction to those cases to which it could alone legally apply. On the other hand, if Congress should pass an anti-trust law general terms of which should include subjects lying without as well as those within its sphere of legislation, such act might be restricted by construction to those matters in respect to which Congress was qualified to enact regulations, without nullifying it as a whole.[19]

3. Criminal and Penal Statutes

§ 166. Generally.—Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions,[20] it is sometimes difficult to apply this process to penal statutes because they are always construed strictly.[1] Hence, the courts incline towards treating a penal statute as void in its entirety whenever one section or clause is clearly unconstitutional.[2] The rule is firmly established, however, that when penal provisions are inserted in general statutes for the regulation of business or matters requiring the exercise of the police power, such penal provisions may be eliminated without impairing the rest of the statute, unless it appears that the penalty clauses are the inducement for the passage of the law.[3] Thus, the provisions of a statute authorizing the regulation of petroleum production by the state corporation commission will not be denied effect because of any invalidity of a provision for fine and imprisonment of one violating the act.[4] Nor does the possible unconstitutionality of criminal portions of a petroleum regulation and sale law invalidate sections providing for inspection and branding.[5] The provisions in an act regulating the licensing of real-estate brokers, conferring power upon the licensing officer to revoke a license in case the licensee is guilty of certain acts, and providing for a review of his acts by the court are separable from the balance of the statute so as not to defeat the whole act if they are unconstitutional because conferring judicial power.[6] This rule has also been applied to taxation statutes so that they will not necessarily be stricken down by the invalidity of clauses relating to penalties.[7]

A statute which provides for both criminal and civil liability may be upheld as to the civil penalties although the provisions for criminal liability are unconstitutional.[8] Provisions imposing duties may be severed from those establishing liabilities,[9] and regulations for the disposition of fines may be eliminated without impairing the validity and effectiveness of clauses requiring the payment of fines into the public treasury.[10]

14 Purdy v. Erie R. Co. 162 N. Y. 42, 56 N. E. 508, 48 L.R.A. 669.

15 Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 S. Ct. 70; Barry v. Iseman, 48 S. C. L. (14 Rich.) 129, 91 Am. Dec. 262; Goggans v. Turnipseed, 1 S. C. 80, 98 Am. Dec. 397, 7 Am. Rep. 23.
Annotation: 61 Am. St. Rep. 940.
The provision of § 17 of the Economy Act of March 20, 1933, repealing "all laws granting or pertaining to yearly renewable term insurance" issued under the War Risk Insurance Act, void in so far as it purports to take away contractual rights, cannot be given the effect to the extent that it operates to take away the remedy for the enforcement of such contracts of insurance. Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

16 Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.
An insolvency law void so far as it attempts to discharge obligations created before its passage may be valid in so far as its operation is prospective. Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

17 **The invalidity so far as interstate commerce is concerned, of the provisions of the Federal Employers' Liability Act of** June 11, 1906, does not invalidate such of its provisions as attempt to regulate commerce within the District of Columbia and the territories. El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 S. Ct. 21.
See Commerce, supra, p. 82, § 90.

18 Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 S. Ct. 581; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 S. Ct. 141.

19 State v. Smiley, 65 Kan. 240, 69 P. 199, 67 L.R.A. 903.

20 See supra, §§ 152 et seq.

1 See Forfeitures and Penalties [Also Penalties, 21 R. C. L. p. 209, § 4]; Statutes [Also 25 R. C. L. p. 1081, §§ 301 et seq.].

2 Butts v. Merchants & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 S. Ct. 964; State ex rel. White v. Wyandotte County, 140 Kan. 744, 39 P. (2d) 286, citing R. C. L.; State v. Cudahy Packing Co. 33 Mont. 179, 82 P. 833, 114 Am. St. Rep. 804, 8 Ann. Cas. 717; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2d) 413, citing R. C. L.
Annotation: Ann. Cas. 1916D, 15.
The unconstitutionality of the classification attempted in a statute regulating the business of sugar refining and of the provisions of that statute creating presumptions of guilt requires that the act fall as a whole. McFarland v. American Sugar Ref. Co. 241 U. S. 79, 60 L. ed. 899, 36 S. Ct. 498.
The imprisonment features of the provisions of the Philippine Penal Code for the punishment of the falsification by a public official of a public and official document are not separable from the invalid accessory punishments therein provided, of deprivation of civil rights and subjection to perpetual disqualification to enjoy political rights, and to perpetual surveillance of the authorities. Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 S. Ct. 544, 19 Ann. Cas. 705.

3 Ohio Tax Cases (Ohio River & W. R. Co. v. Dittey) 232 U. S. 576, 56 L. ed. 737, 34 S. Ct. 372; Grand Trunk R. Co. v. Michigan R Commission, 231 U. S. 457, 58 L. ed. 310, 34 S. Ct. 152; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 S. Ct. 48; Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 S. Ct. 1027; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 S. Ct. 449; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 S. Ct. 527; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 29 S. Ct. 192, 48 L.R.A.(N.S.) 1134, 15 Ann. Cas. 1034; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; People ex rel. Akin v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775, writ of error dismissed in 170 U. S. 182, 42 L. ed. 998, 18 S. Ct. 550; State v. Bevins, 210 Iowa, 1031, 230 N. W. 865, citing R. C. L.; State v. Adams Exp. Co. 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L.R.A. 210, 42 Am. St. Rep. 613; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; State ex rel. Dushek v. Watland, 51 N. D. 710, 39 A.L.R. 1169, 201 N. W. 680; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.
Annotation: Ann. Cas. 1916D, 31 et seq.

4 Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403.

5 Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 S. Ct. 270.

6 Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418.
Annotation: 8 A.L.R. 425.

7 Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398.
The possible invalidity under the due process of law clause of the Federal Constitution of the provisions as to penalties, contained in a state statute taxing wholesale dealers in oils, does not invalidate the wholly independent provisions of that statute for the collection by civil suit of the taxes due the state. Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 S. Ct. 496.

8 Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 9 S. Ct. 277; State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140.

9 Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92.

10 State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L.R.A. 210, 42 Am. St. Rep. 613.

A statute which prohibits the carrying on of two or more allied businesses, such as running a bucket shop and making purchases on margins, may be upheld as to one occupation, although invalid as to the other.[11]

A statute which provides for indeterminate sentences in criminal cases has been held to be valid as to such a sentence as may be imposed for the extent of the minimum period, although it is unconstitutional as to the longer period.[12]

4. Statutes Affecting Public Offices

§ 167. Generally.—Provisions of a statute creating a public office may be separated from other provisions naming the incumbent.[13] It has been held that the right and title to occupy a public office may be severed from provisions in the same statute which define the powers of the incumbent of such office,[14] and that a part of the term of an office which is invalid may be severed from that part of the term which is within the constitutional requirements.[15] A statute may be valid with respect to some officers and invalid as regards others.[16]

A statute which authorizes judicial proceedings to determine the title to office and contains provisions improperly depriving parties in interest of the right to a trial by jury has been held entire, the courts refusing merely to disregard these provisions as unconstitutional and uphold the remainder of the statute as valid.[17]

VII. DISTRIBUTION OF POWERS OF GOVERNMENT

A. As between Federal and State Governments

1. In General

§ 168. Generally.—In the United States the powers of government are divided between the Federal and the state governments. By the terms of the Federal Constitution certain powers are intrusted to the Federal Government alone, while others are reserved to the states, and still others may be exercised concurrently by both the Federal and state governments.[18] The United States

[11] Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 S. Ct. 167.

In Weller v. New York, 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556, it was held that the provisions of a statute requiring a license to engage in the business of reselling tickets to places of amusement and fixing the resale price are severable, so that a conviction for engaging in such business without a license may be sustained, although the provision fixing the resale price may be found to be invalid.

[12] People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L.R.A. 285.

Annotation: 14 L.R.A. 285.

[13] Trahan v. State Highway Commission, 169 Miss. 732, 151 So. 178, citing R. C. L.; McCormick v. Thatcher, 8 Utah, 294, 30 P. 1091, 17 L.R.A. 243.

Annotation: Ann. Cas. 1916D. 81.

[14] Springer v. State, 229 Ala. 339, 157 So. 219, citing R. C. L.; Best v. Moorhead, 96 Neb. 602, 148 N. W. 551, L.R.A.1915C, 378; Newport v. Horton, 22 R. I. 196, 47 A. 312, 50 L.R.A. 330; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Annotation: Ann. Cas. 1916D. 81.

[15] Springer v. State, 229 Ala. 339, 157 So. 219, citing R. C. L.

Sinking Fund Comrs. v. George, 104 Ky. 260, 84 Am. St. Rep. 454, 47 S. W. 779, wherein it was held that where a state Constitution required the legislature in creating offices to limit the term to four years, a law creating an office with a six year term could be upheld to the extent of allowing the incumbent to occupy the office for four years.

Annotation: Ann. Cas. 1916D. 81, 82.

[16] State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469.

Compare Davidson v. Hine, 151 Mich. 294, 115 N. W. 246, 123 Am. St. Rep. 267, 14 Ann. Cas. 352, holding that a statute creating a board of public safety to be appointed by the governor and to have control of the police and fire department of a municipality, if unconstitutional as to one department, is invalid as to the other also.

[17] State ex rel. Atty. Gen. v. Hilburn, 70 Fla. 55, 69 So. 784, citing R. C. L.; Metz v. Maddox, 189 N. Y. 460, 82 N. E. 507, 121 Am. St. Rep. 909.

[18] Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 33 S. Ct. 281, 43 L.R.A.(N.S.) 906,

Supreme Court has divided these powers into four classes: (1) Those which belong exclusively to the National Government, (2) those which belong exclusively to the state, (3) those which may be exercised concurrently and independently by both, and (4) those which may be exercised by the state, but only until Congress shall see fit to act upon the subject. In the latter case the authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur.[19] The two governments—state and national—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers.[20]

The powers which are delegated by the Constitution to the Federal Government, either by its express terms or by necessary implication,[1] are comprehensive and complete without limitations other than those found in the Constitution itself.[2] Since the government of the United States is supreme within its sphere of action,[3] the principle is recognized that if a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence or to its exercise that the property or rights of individuals may thereby be incidentally affected.[4] Moreover, the United States may perform its functions without conforming to the police regulations of a state.[5]

§ 169. Delegation of Powers to Federal Government.—The United States Constitution contains an enumeration of powers expressly granted by the people to the Federal Government.[6] Because the Federal powers are granted by such a grant from the people, it is axiomatic that the United States is a government of limited, enumerated, and delegated powers,[7] and that it cannot

Ann. Cas. 1913E. 905; Chicago & N. W. R. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

"It has often been said that this government is a government of divided powers; those powers of a national character being vested in the National Government, and all other powers vested in the state government." L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669.

See also United States [Also 26 R. C. L. p. 1417, § 5].

[19] Chicago & N. W. R. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710, quoting from Ex parte McNiel, 13 Wall. (U. S.) 236, 20 L. ed. 624.

As to commerce, see Commerce, supra, p. 12, § 10.

[20] See infra, § 174.

[1] See infra, §§ 169, 172, 173.

[2] Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370.

[3] Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 S. Ct. 617; Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; M'Culloch v. Marvland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370; Thomas v. Taylor, 42 Miss. 651, 2 Am. Rep. 625.

[4] Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122.

[5] Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[6] See United States [Also 26 R. C. L. p. 1416, §§ 3 et seq.].

[7] United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914; A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 S. Ct. 655; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60; State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600; Re Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093; Wheeler v. Weightman, 96 Kan. 50, 149 P. 977, L.R.A. 1916A, 846; State v. Sawyer, 113 Me. 458, 94 A. 886, L.R.A.1915F. 1031, Ann. Cas. 1917D. 650; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D. 601; State v. French, 17 Mont. 54, 41 P. 1078, 30 L.R.A. 415; Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B,

exercise any authority not granted by the Federal Constitution either in express words or by necessary implication.[8] In other words, the Federal Constitution is an enabling, and not a restraining, instrument.[9] Nevertheless, since the Federal Constitution is a delegation of powers by the people to the Federal authority, in that measure it constitutes a denial to the people themselves of the exercise of the powers so delegated, as well as a denial of the exercise of any powers inconsistent with the provisions of the Constitution.[10]

Whenever a question arises as to whether the Federal Government has the right to exercise any particular authority, recourse must therefore be had to the Constitution itself in order to determine whether such authority is found therein either by express words[11] or by necessary implication.[12]

In construing a law of the United States, we look to the Federal Constitution to see if the power is granted; but in construing the law of a state, we must determine whether the legislature is prohibited by express words or by implication either in the Federal or state Constitutions from enacting such a law.[13]

2. States as Separate Sovereignties

§ 170. Generally.—The original thirteen states existed prior to the adoption of the Federal Constitution and before that time possessed all the attributes of sovereignty.[14] All these attributes except those surrendered by the

860; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010.

[8] Ashton v. Cameron County Water Improv. Dist. 298 U. S. 513, 80 L. ed. 1309, 56 S. Ct. 892, rehearing denied in 299 U. S. 619, 81 L. ed. 457, 57 S. Ct. 5; Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Rickert Rice Mills v. Fontenot, 297 U. S. 110, 80 L. ed. 513, 56 S. Ct. 374, rehearing denied in 297 U. S. 726, 80 L. ed. 1009, 56 S. Ct. 438; United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 S. Ct. 601; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97; Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L.R.A. 181; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093; Re Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L.R.A. 489; State v. French, 17 Mont. 54, 41 P. 1078, 30 L.R.A. 415; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

Federal power is delegated, and its prescribed limits must not be transcended, even though the end seems desirable. Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 45 S. Ct. 446, 39 A.L.R. 229.

Power to provide for the general welfare independently of the taxing power is not conferred by the provision of the U. S. Const. Art. 1, § 8, empowering Congress "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," but the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare. United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

[9] Worcester v. Georgia, 6 Pet. (U. S.) 570, 8 L. ed. 483; Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676.

[10] Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

[11] Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

[12] South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010.

[13] State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010.

As to limitations on power of state legislature generally, see infra, § 194.

[14] Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Bignell v. Cummins, 69 Mont. 294, 222 P. 797, 36 A.L.R. 634; Com. v. Erie R. Co. 62 Pa. 286, 1 Am. Rep. 399, reversed on other grounds in 15 Wall. (U. S.) 232, 21 L. ed. 146; Respublica v. Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683.

formation of the Constitution and the amendments thereto have been retained.[15] New states, upon their admission into the Union, become invested with equal rights and are subject only to such restrictions as are imposed upon the states already admitted.[16] There can be no state of the Union whose sovereignty or freedom of action is in any respect different from that of any other state. There can be no restriction upon any state other than one prescribed upon all the states by the Federal Constitution. Congress, in admitting a state, cannot restrict such state by bargain. The state, by so contracting with Congress, is in no way bound by such a contract, however irrevocable it is stated to be.[17] It is said that subject to the restraint and limitations of the Federal Constitution, the states have all the sovereign powers of independent nations[18] over all persons and things within their respective territorial limits.[19]

§ 171. Reservation of Powers to States.—It has been said that in the peculiar dual form of government in the United States, each state has the right to order its own affairs and govern its own people except so far as the Federal Constitution expressly or by fair implication has withdrawn that power.[20] When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states, and remain, after the acceptance of the Constitution, what they were before, except so far as they may be abridged by that instrument.[1]

v. Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

[15] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; United States v. California, 297 U. S. 175, 80 L. ed. 567, 56 S. Ct. 421; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Re Terui, 187 Cal. 20, 200 P. 954, 17 A.L.R. 630; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Bignell v. Cummins, 69 Mont. 294, 222 P. 797, 36 A.L.R. 634; United States Fidelity & G. Co. v. Bramwell, 108 Or. 261, 217 P. 332, 32 A.L.R. 829; Com. v. Erie R. Co. 62 Pa. 286, 1 Am. Rep. 399, reversed on other grounds in 15 Wall. (U. S.) 232, 21 L. ed. 146; Respublica v. Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683.

[16] Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 S. Ct. 399; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Bignell v. Cummins, 69 Mont. 294, 222 P. 797, 36 A.L.R. 634; State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934.

[17] Annotation: 52 L.R.A.(N.S.) 306.

The power given to Congress by the U. S. Const. Art. 4, § 3, does not authorize it to impose any conditions upon the states so admitted other than the conditions of the Federal Constitution, operating alike on all the states. State v. Edmondson, 89 Ohio St. 93, 105 N. E. 269, 52 L.R.A.(N.S.) 305, Ann. Cas. 1915D, 934. Annotation: 52 L.R.A.(N.S.) 305; Ann. Cas. 1915D, 942.

[18] Colorado v. Symes, 286 U. S. 510, 76 L. ed. 1253, 52 S. Ct. 635; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529; People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Roller v. Murray, 71 W. Va. 161, 76 S. E. 172, L.R.A.1915F, 984, Ann. Cas. 1914B, 1139, writ of error dismissed in 234 U. S. 738, 58 L. ed. 1570, 34 S. Ct. 902.

[19] New York v. Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Lynch's Case, 281 Mass. 454, 183 N. E. 834, 86 A.L.R. 285; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375.

The states remain sovereign within their separate spheres as to all powers not delegated to the general government or prohibited to the states. Subject to these restrictions each state is supreme, and possesses the exclusive right of regulating its own internal affairs, and in all such matters is sovereign so long as it does not conflict with the Federal Constitution. Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

[20] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111; Re Bank of Commerce, 153 Ind. 460, 55 N. E. 224, 47 L.R.A. 489; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Wheeler v. Weightman, 96 Kan. 50, 149 P. 977, L.R.A. 1916A, 846; State v. Sawyer, 113 Me. 458, 94 A. 886, L.R.A.1915F, 1031, Ann. Cas. 1917D, 650; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617; N'tka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863.

[1] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Sturges v.

Although the general government and the states exist within the same territorial limits, each form of government, whether Federal or state, is supreme within its sphere, the former as to all powers granted, expressly or impliedly, under the Federal Constitution, and the state as to all other powers.[2] Not only can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible states.[3] The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.[4] Although a particular provision of the Federal Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the states when the Constitution was adopted.[5] Moreover, a widespread similarity of local conditions cannot confer upon Congress powers reserved to the states by the Federal Constitution.[6] For these reasons a provision in a law which permits the conversion of state building and loan associations into Federal ones in contravention of the laws of the place of their creation is unconstitutional as an encroachment upon the reserved powers of the state.[7] It should be noted, however, that § 75 of the Bankruptcy Act, 11 U. S. C. A. § 203, is not an invasion of the sovereign powers of the states.[8]

It is well settled and generally recognized that there is a wide range of particular unexpressed powers which have been reserved to the states,[9] such as, for illustration, the right to determine the qualifications for state offices and the conditions on which its citizens may exercise their various callings,[10] the control

Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

Powers not expressly or by necessary implication granted by the Constitution to the Federal Government nor prohibited by it to the states are reserved to the states or to the people. State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

It is well settled that it was competent for the people to invest the Federal Government, through the Constitution, with all the powers which they might deem necessary or proper, and to make those powers, so far as conferred, supreme, to prohibit the states from exercising any powers incompatible with the objects of the general compact, and to reserve in themselves those sovereign authorities which they did not choose to delegate either to Federal or state government. Re Opinion of Justices, 118 Me. 544, 107 A. 673, 5 A.L.R. 1412.

2 Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; United States v. Sprague, 282 U. S. 716, 75 L. ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381; Collector v. Day (Buffington v. Day) 11 Wall. (U. S.) 113, 20 L. ed. 122; Wright v. House, 188 Ind. 247, 121 N. E. 433, citing R. C. L.; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375.

3 Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110; Texas v. White, 7 Wall. (U. S.) 700, 19 L. ed. 227.

4 Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529, 3 A.L.R. 649, Ann. Cas. 1918E, 724.

5 Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 S. Ct. 237.

6 United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 A.L.R. 914.

7 Hopkins Federal Sav. & L. Asso. v. Cleary, 296 U. S. 315, 80 L. ed. 251, 56 S. Ct. 235, 100 A.L.R. 1403.
Annotation: 100 A.L.R. 1413.

8 United States Nat. Bank v. Pamp (C. C. A. 8th) 77 F. (2d) 9, 99 A.L.R. 1370.
As to the general principles controlling the validity of agricultural compositions, see BANKRUPTCY, Vol. 6, p. 785, § 444.

9 People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389.
A state, in some instances, can possess and enforce prerogative rights which are not possessed by the Federal Government in the absence of a Federal statute. United States Fidelity & G. Co. v. Bramwell, 108 Or. 261, 217 P. 332, 32 A.L.R. 829.

10 Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Meffert v. State Bd. of Medical Registration, 66 Kan. 710, 72 P.

of domestic relationship of husband and wife and parent and child,[11] prohibitory laws,[12] exclusive control over property acquisition and transfer and estate management,[13] and inherent powers generally, such as the right to exercise the power of eminent domain.[14]

3. Implied Powers of Federal Government

§ 172. Generally.—Although the Federal Government is based upon delegated and enumerated powers,[15] it is universally recognized that that which is implied in the Constitution is as much a part of it as that which is expressed.[16] It has been said that there is not in the whole of the Constitution a grant of power which does not carry with it others, not expressed, but vital to its exercise.[17] Accordingly, a power may be implied whenever necessary to give effect to a power expressly granted.[18] It is therefore recognized that it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined or from them all combined.[19] The powers conferred upon the Federal Government are to be reasonably and fairly construed with a view to effectuate their purpose,[20] and that which is reasonably appropriate and relevant to the exercise of a power granted by the Constitution is to be considered as accompanying the grant.[1]

§ 173. Implied Congressional Powers and Congressional Discretion.—The general principles which govern the doctrine of implied powers find important application in defining the limits of congressional power. By the Constitution of the United States, Congress is specifically empowered to enact all laws which may be necessary and proper to carry into effect the powers expressly granted to it.[2] The powers of the Constitution are expressed in general terms, leaving

247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.
Annotation: 1 L.R.A.(N.S.) 811.

11 Ohio ex rel. Popovici v. Agler, 280 U. S. 379, 74 L. ed. 489, 50 S. Ct. 154.

12 McCormick & Co. v. Brown, 286 U. S. 131, 76 L. ed. 1017, 52 S. Ct. 522, 87 A.L.R. 448.
See also the provisions of the Twenty-first Amendment to the Federal Constitution.

13 People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093.
As to the right of a state to control the transmission of property within its borders, see CONFLICT OF LAWS, supra, p. 328, § 30; p. 352, § 65.

14 Com. v. Erie R. Co. 62 Pa. 286, 1 Am. Rep. 399, reversed on other grounds in 15 Wall. (U. S.) 232; Stearns v. Barre, 73 Vt. 281, 50 A. 1086, 58 L.R.A. 240, 87 Am. St. Rep. 721.

15 See supra, § 169.

16 International Shoe Co. v. Pinkus, 278 U. S. 261, 73 L. ed. 318, 49 S. Ct. 108; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737.
As to construction by implication of Constitutions generally, see supra, §§ 56 et seq.

17 Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. ed. 242.
The court will not adopt that narrow construction of the Constitution which would deny those powers which the ordinary import of language would confer and which would cripple the government and render it unequal to the objects for which it is declared to be instituted and to which the powers given, as fairly understood, render it competent. Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23.

18 Mackenzie v. Hare, 239 U. S. 299, 60 L. ed. 297, 36 S. Ct. 106, Ann. Cas. 1916E, 645; House v. Hayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Imperial Irrig. Co. v. Jayne, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322.

19 Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152; Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

20 Railroad Retirement Bd. v. Alton R. Co. 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 758.

1 Marshall v. Gordon, 243 U. S. 521, 61 L. ed. 881, 37 S. Ct. 448, L.R.A.1917F, 279, Ann. Cas. 1918B, 371.

2 Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 S. Ct. 152; Bank of United States v. Halstead, 10 Wheat. (U. S.) 51, 6 L. ed. 264; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

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to the legislature, from time to time, the adoption of its own means to effectuate legitimate objects and to mold and model the exercise of its powers as its own wisdom, and the public interests shall require.[3]

The Supreme Court of the United States has announced that grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect.[4] It is a settled principle of constitutional law that the government which has a right to do an act and has imposed upon it the duty of performing that act must, according to the dictates of reason, be allowed to select the means.[5] The sum and substance of the doctrine as to implied powers has been repeatedly asserted in language which has now become historic: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are proper, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[6] Thus, any act of Congress plainly and directly tending to enhance the love and respect of the citizen for the country's institutions and quicken and strengthen his motives to defend them and which is germane to, intimately connected with, and appropriate to, the exercise of one or more of the powers granted to Congress is valid.[7]

The rule is settled that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers.[8] Consequently, where an act of Congress is not prohibited and is really calculated to effect any of the objects intrusted to the Federal Government, the courts will not undertake to inquire into the degree of its necessity, since this

3 Dillon v. Gloss, 256 U. S. 368, 65 L. ed. 994, 41 S. Ct. 510; First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 233, 37 S. Ct. 734, L.R.A.1918C, 283, Ann. Cas. 1918D, 1169; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

4 First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 S. Ct. 734, L.R.A. 1918C, 283, Ann. Cas. 1918D, 1169; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 S. Ct. 617; Carnahan v. United States (C. C. A. 8th) 35 F. (2d) 96, 67 A.L.R. 1035, writ of certiorari denied in 281 U. S. 723, 74 L. ed. 1141, 50 S. Ct. 238; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093. See also Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260, 40 S. Ct. 141.

Congress has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined by the Constitution. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also or, in other words, that the power flows as a necessary means to accomplish the end. Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

In the exercise of its discretion as to means of carrying into execution powers conferred by the Constitution, Congress may adopt any means appearing to it most eligible and appropriate which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. James Everard's Breweries v. Day, 265 U. S. 545, 68 L. ed. 1174, 44 S. Ct. 628.

The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Ruddy v. Rossi, 248 U. S. 104, 63 L. ed. 148, 39 S. Ct. 46, 8 A.L.R. 843.

As to the general principles involved, see supra, §§ 56, 58.

As to the power of Congress to create corporations, see CORPORATIONS [Also 7 R. C. L. p. 30, § 7].

5 M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; State v. Superior Ct. 67 Wash. 37, 120 P. 861, Ann. Cas. 1913D, 78.

6 Ruddy v. Rossi, 248 U. S. 104, 63 L. ed. 148, 39 S. Ct. 46, 8 A.L.R. 843; First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 S. Ct. 734, L.R.A.1918C, 283, Ann. Cas. 1918D, 1169; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, 4 S. Ct. 122; Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187.

7 United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 S. Ct. 427.

8 Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

would be beyond the province of the judicial department and would trespass on legislative ground.[9] Where the end is one for which the legislative power may properly be exercised, the extent to which the provisions of a statute as means conduce to that end, the degree of their efficiency, and the closeness of their relation to the end sought to be attained are matters addressed to the judgment of the legislature and not to that of the courts. It is enough if it can be seen that in any degree or under any reasonably conceivable circumstances there is an actual relationship between the means and the end.[10]

Congress in the exercise of sound discretion must determine in what manner it will exercise a power which it possesses,[11] such as the power to tax[12] or to promote the general welfare.[13] For other examples under the power to establish post offices and post roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen.[14] Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different states every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the states but of free persons in the territories, and not only an enumeration of persons, but the collection of statistics respecting age, sex, and production.[15]

There are limits to the implied powers of Congress. If the means employed should have no real substantial relation to the public objects which government may legally accomplish, if they should be arbitrary and unreasonable beyond the necessities of the case, or if Congress in the execution of its powers should adopt measures which are prohibited by the Constitution, such enactments would unquestionably be held unconstitutional and void.[16] Thus, Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government.[17] Any provision of an act of Congress ostensibly enacted under power granted by the Constitution,

9 Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 S. Ct. 1016; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187.

As to the general rule that courts will not inquire into the necessity of legislative action, see supra, § 138.

10 Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

Unless there is manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of congressional authority is not subject to judicial interference. Marshall v. Gordon, 243 U. S. 521, 61 L. ed. 881, 37 S. Ct. 448, L.R.A.1917F, 279, Ann. Cas. 1918B, 371.

11 Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 S. Ct. 374.

As to analogous discretion of state legislatures in selecting the means to carry out their powers, see infra, § 199.

12 Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312.

13 Helvering v. Davis, 301 U. S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319.

14 Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

15 Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287; United States v. Marigold, 9 How. (U. S.) 560, 13 L. ed. 257.

16 Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175.

Congress is not authorized to enact laws in furtherance even of a legitimate end merely because they are useful or because they make the government stronger. There must be some relationship between the means and the end, but that relationship need not be direct and immediate. Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

17 Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 45 S. Ct. 446, 39 A.L.R. 229.

not naturally or reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the states, is invalid and cannot be enforced.[18]

The conditions under which congressional powers are exercised will not change the nature of those powers, although powers ordinarily dormant may be called into action. While an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.[19] Even when circumstances may make it desirable to call into operation congressional activity not ordinarily invoked, the exercise of any powers must be evoked and checked carefully to see if such powers actually exist under the constitutional grants, because extraordinary conditions do not create or enlarge constitutional power, and cannot justify governmental action outside the sphere of constitutional authority.[20]

In the consideration of Federal powers granted to Congress, it must always be remembered that the existence of congressional power under the Federal Constitution is not determined by the extent of the exercise of the authority conferred under it.[1]

4. Interference by the United States or States with Agencies of Each Other

a. In General

§ 174. Generally.—Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government. This corresponds to the prohibition that no state can interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it.[2] In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.[3] Therefore, whenever the Federal power is exerted within what would otherwise be the domain of

18 Linder v. United States, 268 U. S. 5, 69 L. ed. 819, 45 S. Ct. 446, 39 A.L.R. 229; Child Labor Tax Case (Bailey v. Drexel Furniture Co.) 259 U. S. 20, 66 L. ed. 818, 42 S. Ct. 449, 21 A.L.R. 1432; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529, 3 A.L.R. 649, Ann. Cas. 1918E, 724; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 S. Ct. 470, 16 Ann. Cas. 1066; United States v. Dewitt, 9 Wall. (U. S.) 41, 19 L. ed. 593; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

19 Wilson v. New, 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298, L.R.A.1917E, 938, Ann. Cas. 1918A, 1024.

Acts of Congress may be adapted to the exercise of lawful power and appropriate to it, in seasons of exigency, which would be inappropriate at other times. Legal Tender Cases, 12 Wall. (U. S.) 457, 20 L. ed. 287.

As to the exercise of powers by state legislatures in times of emergency, see infra, § 252.

As to the conclusiveness of legislative determination and the declaration of emergency, see supra, § 144.

20 A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947.

1 Smith v. Kansas City Title & T. Co. 255 U. S. 180, 65 L. ed. 577, 41 S. Ct. 243.

2 Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A.L.R. 1226; Carlesi v. New York, 233 U. S. 51, 58 L. ed. 843, 34 S. Ct. 576; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737.

Annotation: 4 Ann. Cas. 747.

3 Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A.L.R. 1226; Metcalf v. Mitchell, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Banks v. New York (New York ex rel. Bank of New York Nat. Bkg. Asso. v. Connelly) 7 Wall. (U. S.) 16, 19 L. ed. 57; Bank Tax Case (New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. (U. S.) 200, 17 L. ed. 793; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black (U. S.) 620, 17 L. ed. 451; Weston v. Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

state power, the justification of the exercise of the Federal power must clearly appear.[4]

The most obvious method of interference is in the exercise of the power of taxation, and accordingly unless given permission to do so a state cannot tax Federal agencies,[5] real property while it is owned by the United States,[6] or the franchise of a corporation created to carry into effect powers conferred on the Federal Government in its sovereign capacity,[7] since it is said the power to tax involves the power to destroy.[8] A corporation which acts as agent for the Federal Government will be protected by the national authority against any encroachment under state authority upon the rights and immunities expressly granted to it by the act of Congress or which it enjoys in its capacity as such agent.[9] There is, however, a well-recognized limitation to the protection which is secured to such Federal agencies, it being held that the Constitution protects from such legislation only that which tends to impair its utility as an instrumentality of the Federal Government.[10]

b. Action by Congress

§ 175. In Concurrent Field of Legislation.—It must be noticed that our scheme of government contemplates the delegation of certain and defined powers to national control and the reservation of equally certain powers to state or local control. Although there is with respect to the existence and location of those powers no conflict between state and Federal sovereignties, yet, in a complicated system such as ours, wherein exist two governments over the same people, in which in different ways the laws first of one and then of the other are supreme according to the authority under which they are enacted

4 Florida v. United States, 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119.

As to the reservation of powers to states, see supra, § 171.

5 Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

Annotation: 56 A.L.R. 587.

A rule firmly established in our jurisprudence is that the bonds of the United States government cannot be taxed by the states and that bonds of the states cannot be taxed by the United States Government, because such bonds are only instrumentalities of government and the power of the Federal Government to tax the bonds of the states, as well as the power of the state government to tax the bonds of the general government, would be a power to embarrass each sovereignty in the exercise of its governmental functions. Re First Nat. Bank, 58 Okla. 508, 160 P. 469, L.R.A.1917B, 294, overruled on another point in Board of Equalization v. First State Bank, 77 Okla. 291, 188 P. 115.

A state may tax a national bank as a stockholder in another national bank. Bank of California v. Richardson, 248 U. S. 476, 63 L. ed. 372, 39 S. Ct. 165.

A city tax of 50 cents per pole has been upheld as not constituting an undue burden on a telegraph company as a Federal agency. Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. ed. 863, 39 S. Ct. 428.

For an exhaustive analysis of these principles, see Taxation [Also 26 R. C. L. p. 95, §§ 71 et seq.].

6 Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 29 L. ed. 845, 6 S. Ct. 670.

7 Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 8 S. Ct. 1073; Union P. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; State v. Clement Nat. Bank, 84 Vt. 167, 78 A. 944, Ann. Cas. 1912D, 22, affirmed in 231 U. S. 120, 58 L. ed. 147, 34 S. Ct. 31.

Annotation: Ann. Cas. 1912D, 37.

8 Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 S. Ct. 648; Union P. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787; Bank of Commerce v. New York, 2 Black (U. S.) 620, 17 L. ed. 451; M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

9 Western U. Teleg. Co. v. New York (C. C.) 38 F. 552, 3 L.R.A. 449.

10 Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 S. Ct. 110, 4 Ann. Cas. 737; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 12 S. Ct. 810; Hawley v. Hurd, 72 Vt. 122, 47 A. 401, 52 L.R.A. 195, 82 Am. St. Rep. 922.

Annotation: 4 Ann. Cas. 747.

and with reference to the subjects to which they are addressed, conflicts in the exercise of those powers are inevitable.[11]

The Supreme Court at an early date laid down a broad formula which from that time has been the general principle governing the possibility of state exercise of power. The court held that the states may exercise concurrent or independent power in all cases except three: (1) Where the power is lodged exclusively in the Federal Constitution; (2) where it is given to the United States and prohibited to the states; (3) where, from the nature and subjects of the power, it must necessarily be exercised by the National Government.[12]

By reason of the provision of the United States Constitution that the Constitution and laws passed in pursuance thereto shall be the supreme law of the land,[13] if a law passed by a state in the exercise of its acknowledged powers comes into conflict with an act of Congress, the state law must yield. The Federal and state legislatures cannot occupy the position of equal opposing sovereignties, because the Constitution declares the supremacy of the laws passed in pursuance thereof.[14] The principle is therefore fundamental that state laws must yield to acts of Congress within the sphere of its delegated power.[15] It is very obvious that where Congress has under the Federal Constitution the right of exercising exclusive jurisdiction and puts forth its power to cover the field, state legislation ceases to have efficacy;[16] for when Congress passes a law in that field of legislation common to both Federal and state governments, the act of Congress supersedes all inconsistent state legislation.[17] Congress in regulating a matter within the concurrent field of legislation speaks for all of the people and all of the states, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the states with respect to the subject matter of such legislation.[18]

A state law is superseded by a Federal regulation only to the extent that the two may be inconsistent. An act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject[19] or merely to supplement the Federal legislation in respect to local conditions.[20]

The main question in cases presenting this problem is the determination of

11 Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104.

12 Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96 (summarizing language in which Mr. Justice Story originally formulated this group of principles in Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. ed. 19).

13 See supra, §§ 40 et seq.

14 Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865.

15 Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715.

16 Com. v. Nickerson, 236 Mass. 281, 128 N. E. 273, 10 A.L.R. 1568.

17 Jennings v. United States Fidelity & G. Co. 294 U. S. 216, 79 L. ed. 869, 55 S. Ct. 394, 99 A.L.R. 1248; International Shoe Co. v. Pinkus, 278 U. S. 261, 73 L. ed. 318, 49 S. Ct. 108; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 858, 19 S. Ct. 465; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 155 S. W. 1119, 37 L.R.A.(N.S.) 31; McPherson v. Blacker, 92 Mich. 377, 52 N. W. 469, 16 L.R.A. 475, 31 Am. St. Rep. 587, affirmed in 146 U. S. 1, 36 L. ed. 869, 13 S. Ct. 3; Columbus Packing Co. v. State, 100 Ohio St. 285, 126 N. E. 291, 29 A.L.R. 1429, overruled on another point in 106 Ohio St. 469, 140 N. E. 376, 37 A.L.R. 1525; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

Annotation: 11 L.R.A. 246.

See also CONFLICT OF LAWS, supra, p. 306, § 8.

18 Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44.

19 Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715.

20 People v. Erie R. Co. 198 N. Y. 369, 91 N. E. 849, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811.

Annotation: 19 Ann. Cas. 816 (hours of labor).

the existence of a conflict. When the question is where the Federal act overrides a state law, the entire scheme of the statute must be considered, and a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy or Congress has at least manifested a purpose to exercise its paramount authority over the subject.[1] The rule has been laid down that statutes of Congress and a state are in conflict when one incurs the penalty of the Federal law by obeying the state law or incurs the penalty of the state law by obeying the Federal law.[2] Thus, if a state statute prohibiting an act as a police measure can be upheld and enforced without obstructing or embarrassing the execution of an act of Congress prohibiting the same act as a war measure, the state statute may be enforced.[3] Under certain circumstances the state enactments may properly be upheld as supplementary regulations, since it is only an actual conflict of legislation which operates to suspend inconsistent state laws. For example, it has been held that the provision of the Constitution of the United States that Congress shall have power to establish uniform laws on the subject of bankruptcy does not in itself inhibit the states from passing valid insolvent laws and that it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states.[4]

To illustrate the effect of congressional legislation in regulating subjects within the exclusive field of activity available only to Congress, reference may be made to laws regulating interstate commerce.[5] In certain fields the states may nevertheless legislate on matters which affect interstate commerce indirectly, although when Congress acts in such a field state laws are superseded.[6] Another example of the field of concurrent jurisdiction is in harbor improvements, wherein congressional activity supersedes state legislation.[7]

§ 176. —Under Specific Provision for Concurrent Power.—The Eighteenth Amendment to the Federal Constitution, while it remained in effect, specifically provided for its enforcement by a concurrent exercise of power by Federal and state legislatures. The interpretation of the phrase "concurrent power" as employed in that amendment may serve as a guide for the construction of such terminology in constitutional provisions which may be enacted in the future.

The words "concurrent power" in the declaration in the Eighteenth Amendment to the Federal Constitution that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" did not mean joint power or require that legislation thereunder by Congress, to

1 Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

2 Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 S. Ct. 140; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

3 Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.

4 International Shoe Co. v. Pinkus, 278 U. S. 261, 73 L. ed. 318, 49 S. Ct. 108; McRaney v. Riley, 128 Miss. 665, 91 So. 399, 22 A.L.R. 685, writ of certiorari denied in 260 U. S. 727, 67 L. ed. 484, 43 S. Ct. 90; Lace v. Smith, 34 R. I. 1, 82 A. 268, Ann. Cas. 1913E, 945; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

Annotation: Ann. Cas. 1913E, 957.

For a detailed treatment, see BANKRUPTCY, Vol. 6, p. 519, § 5.

5 See COMMERCE, supra, p. 12, § 10.

6 Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 S. Ct. 635, L.R.A.1915C, 1, Ann. Cas. 1915B, 475; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A. (N.S.) 44; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 14 S. Ct. 1087; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 S. Ct. 454; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. (U. S.) 421, 15 L. ed. 435; State v. Northern P. R. Co. 36 Mont. 582, 93 P. 945, 15 L.R.A.(N.S.) 134, 13 Ann. Cas. 144.

7 Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668.

be effective, should be approved or sanctioned by the several states or any of them, nor did they mean that the power to enforce was divided between Congress and the several states along the lines which separate or distinguish foreign or interstate commerce from intrastate affairs.[8] The power confided to Congress by these provisions of the Eighteenth Amendment, while not exclusive, was territorially coextensive with the prohibition of that amendment, embraced manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and was in no wise dependent on, or affected by, action or inaction on the part of the several states or any of them.[9] Moreover, a state prohibitory liquor law which was consistent with prohibition, did not tend to defeat or thwart it, and was appropriate legislation upon that subject was not abrogated by the Eighteenth Amendment to the Federal Constitution or the Volstead Act of Congress.[10] Congress had no power actually to control the concurrent legislation of the states with respect to the enforcement of the Eighteenth Amendment to the Federal Constitution.[11] It was held, however, that notwithstanding state and Federal power over intoxicating liquors was concurrent, in case of repugnancy between the statutes of the respective jurisdictions, constitutional acts of Congress would be held supreme.[12] Therefore, in case of irreconcilable conflict between state and Federal statutes for the enforcement of the Eighteenth Amendment, state courts, in the absence of a final decision by the Supreme Court of the United States, had to treat the Federal statute as supreme.[13]

c. Silence of Congress

§ 177. Generally.—In defining the limits of the fields of legislation in which, under certain circumstances, both the Federal and state governments may enact legislation, many difficult questions have arisen.[14] An important principle commonly referred to as "the doctrine of the silence of Congress" is of frequent application in determining whether a state may enact regulations in a field of legislation in the absence of any direct expression of the will of the Federal Government.[15]

Whenever the subjects of a power are in their nature national or admit of one uniform system or plan, exclusive regulation by Congress is presumed to be required.[16] In such cases the failure of Congress to exercise the power of regulation is deemed to be an expression of its will that the subject should remain free from restrictions or impositions upon it by the several states.[17] Several tests have been established for the determination as to when the doctrine of the silence of Congress should be applied so as to negative legislation by the several states. The power of Congress is exclusive whenever a state

[8] National Prohibition Cases (Rhode Island v. Palmer) 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588.

[9] National Prohibition Cases (Rhode Island v. Palmer) 252 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486, 588.
Annotation: 10 A.L.R. 1588, s. 11 A.L.R. 1320, 26 A.L.R. 661, and 70 A.L.R. 132.

[10] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.
Annotation: 10 A.L.R. 1587, s. 11 A.L.R. 1320, 26 A.L.R. 661, and 70 A.L.R. 132.

[11] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.

[12] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.
Annotation: 10 A.L.R. 1587, s. 11 A.L.R. 1320, 26 A.L.R. 661, and 70 A.L.R. 132.

[13] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.
Annotation: 10 A.L.R. 1587, s. 11 A.L.R. 1320, 26 A.L.R. 661, and 70 A.L.R. 132.

[14] See supra, § 175.

[15] See infra, § 178.

[16] Cardwell v. American Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 S. Ct. 423; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Cooley v. Philadelphia, 12 How. (U. S.) 299, 13 L. ed. 996.

[17] Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 10 S. Ct. 681; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 S. Ct. 1091; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

enactment would clearly be repugnant to the exercise of authority by the United States Government [18] or whenever the subject matter is national in character so as to require uniformity of regulation affecting all the states alike.[19]

On the other hand, where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of operation, the rule is well established that the several states may prescribe regulations until Congress intervenes.[20] This is clearly the case where the regulations which should govern may in many respects be different in different localities, and for that reason better understood and more wisely established by the local authorities.[1]

In order to determine whether a state statute is a just exercise of the state power or is intended by roundabout means to invade the domain of Federal authority, the courts will look into its operation and effect in order to discern its true purpose.[2]

§ 178. Applications of Doctrine of Silence of Congress.—The right of the several states to enact legislation during the silence of Congress has been recognized in respect to a variety of subjects, such as insolvency,[3] the regulation of dealers in patented articles,[4] the recital of the consideration of notes given for the price of patent rights,[5] the prohibition of the use of the United States flag for advertising purposes,[6] the establishment of quarantine regulations,[7] regulations with regard to the speed of railroad trains,[8] regulations with regard to rates of transportation between points within the boundaries of a state,[9] the qualifications, duties, and liabilities of employees on railroad trains, although engaged in interstate commerce, the establishment of the equipment of railroad cars,[10] pilotage,[11] and the erection of bridges, dams, and other structures con-

[18] Weaver v. Fegely, 29 Pa. 27, 70 Am. Dec. 151.

[19] State v. Peet, 80 Vt. 449, 68 A. 661, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998.

[20] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Columbus Packing Co. v. State, 100 Ohio St. 285, 126 N. E. 291, 29 A.L.R. 1429, overruled on another point in 106 Ohio St. 469, 140 N. E. 376, 37 A.L.R. 1525; State v. Peet, 80 Vt. 449, 68 A. 661, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998.

[1] Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114.

[2] Compagnie Francaise de Nav. a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 S. Ct. 811.
For general applications of this principle, see supra, § 101.

[3] Brown v. Smart, 145 U. S. 454, 35 L. ed. 773, 12 S. Ct. 958; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 S. Ct. 269; Gilman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. ed. 432; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Tennessee Bank v. Horn, 17 How. (U. S.) 157, 15 L. ed. 70; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Northern Bank v. Squires, 8 La. Ann. 318, 58 Am. Dec. 682.

[4] Allen v. Riley, 203 U. S. 347, 51 L. ed. 216, 27 S. Ct. 95, 8 Ann. Cas. 137; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 S. Ct. 89.
See also Patents [Also 20 R. C. L. p. 1182, § 64].

[5] Woods v. Carl, 203 U. S. 358, 51 L. ed. 219, 27 S. Ct. 99.

[6] Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754.
Annotation: 7 L.R.A.(N.S.) 1079; 121 Am. St. Rep. 767; 4 Ann. Cas. 270.

[7] Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; People v. Erie R. Co. 198 N. Y. 369, 91 N. E. 849, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811; State v. Peet, 80 Vt. 449, 68 A. 661, 14 L.R.A.(N.S.) 677, 130 Am. St. Rep. 998.
For general discussion, see Health [Also 12 R. C. L. p. 1290, § 29].

[8] See Commerce, supra, p. 23, § 22; Railroads [Also 22 R. C. L. p. 789, § 44].

[9] Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 S. Ct. 418.
See Carriers, Vol. 9, p. 454, § 44; Commerce, supra, p. 19, § 18.

[10] Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 S. Ct. 418; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564; People v. Erie R. Co. 198 N. Y. 369, 91 N. E. 849, 29 L.R.A.(N.S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811.
See also Carriers, Vol. 9, p. 485, § 83; Commerce, supra, p. 23, § 22; Railroads [Also 22 R. C. L. p. 791, § 46, p. 788, § 43, p. 789, § 44].

[11] Cardwell v. American Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 S. Ct. 423; The Lottawanna (Road v. Heartt) 21 Wall. (U. S.) 558, 22 L. ed. 654; Chicago & N.

stituting obstructions to navigation or otherwise pertaining to navigation.[12]

§ 179. Permission by Congress as to State Legislation.—Congress may, under certain circumstances, take away the protection of the interstate commerce clause so as to make applicable state legislation at an earlier time than it would otherwise be applicable. The Twenty-first Amendment to the Federal Constitution has a similar operation.[13]

An important illustration of congressional legislation indicating consent to state regulations exists in the Act of Congress of August 8, 1890, commonly known as the Wilson Act, which provides that intoxicating liquor when imported into a state shall become, immediately upon its arrival, subject to the law of such state, so that the sale there, if forbidden by the law of the state, is unlawful, although made by the importer and in the original package.[14] Another illustration of the apparent ability of the Federal Government to permit such legislation in a field closed to the states prior to such Federal enactment consists of the Act of Congress of June 3, 1864, as amended February 10, 1868, which permitted the local taxation of national banks at a rate not in excess of that assessed upon other moneyed capital in the hands of individual citizens of the state.[15] Prior to the passage of this act, states had been refused the right to tax in any manner national banks, such legislation being considered an interference by the states with Federal agencies.[16]

B. As between the Several Departments

1. In General

§ 180. Generally.—In considering the nature of any government, it must be remembered that the power existing in every body politic is an absolute despotism; in constituting a government, the body politic distributes that power as it pleases and in the quantity it pleases, and imposes what checks it pleases upon its public functionaries. The natural and necessary distribution of that power, with respect to individual security, is into legislative, executive, and judicial departments. It is obvious, however, that every community may make a perfect or imperfect separation and distribution of that power at its will.[17]

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among the three departments of government, the legislative, executive, and judicial, and that each of these is separate from the others.[18] The principle as to the separation of the powers of

W. R. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. ed. 96; Cooley v. Philadelphia, 12 How. (U. S.) 299, 13 L. ed. 996 (this case is given as an illustration of the principle in Pound v. Turck, 95 U. S. 459, 24 L. ed. 525).

See also Commerce, supra, p. 24, § 23.

[12] Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 S. Ct. 357; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668; Chicago & N. W. R. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. ed. 710; Willson v. Black Bird Creek Marsh Co. 2 Pet. (U. S.) 245, 7 L. ed. 412; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636.

See also Bridges, Vol. 8, p. 917, § 11; Commerce, supra, p. 24, § 23.

[13] Annotation: 110 A.L.R. 951 et seq.
See Intoxicating Liquors.

[14] Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 49 L. ed. 925, 25 S. Ct. 552; Re Spickler (C. C.) 43 F. 653, 10 L.R.A. 446; Re Van Vliet (C. C.) 43 F. 761, 10 L.R.A. 451; Hart v. State, 87 Miss. 171, 39 So. 523, 112 Am. St. Rep. 437.

Annotation: 15 L.R.A.(N.S.) 923.
See Commerce, ante, p. 18, § 16.

[15] McHenry v. Downer, 116 Cal. 20, 47 P. 779, 45 L.R.A. 737.

[16] See Taxation [Also 26 R. C. L. p. 109, §§ 84 et seq.].

[17] Livingston v. Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751 (per Johnson, J.).

[18] O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740; Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480; J. W. Hampton Jr., & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Evans v. Gore, 253 U. S. 245, 64 L. ed. 887, 40 S. Ct. 550, 11 A.L.R. 519; Kilbourn v. Thompson, 103

government operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary.[19] It has been said that the object of the Federal Constitution was to establish three great departments of government: The legislative, the executive, and the judicial departments. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them.[20]

The Supreme Court of the United States has announced that so far as these powers are derived from the Federal Constitution the departments may be regarded as independent of each other, but beyond that all are subject to regulations by law touching the discharge of the duties required to be performed.[1] The rule is generally recognized that constitutional restraints are overstepped

U. S. 168, 26 L. ed. 377; Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; Norwalk Street R. Co's Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Burnett v. Green, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; Re Speer, 53 Idaho, 293, 23 P. (2d) 239, 88 A.L.R. 1086; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; Parker v. State, 135 Ind. 534, 35 N. E. 179, 23 L.R.A. 859; State v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222; Harris v. Allegany County, 130 Md. 488, 100 A. 733, L.R.A. 1917E, 824; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 350, 12 A.L.R. 26; People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L.R.A. (N.S.) 917, Ann. Cas. 1912B, 688; Veto Case, 69 Mont. 325, 222 P. 428, 35 A.L.R. 592; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L.R.A.(N.S.) 350; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; State ex rel. Atty.-Gen. v. Knight, 169 N. C. 333, 85 S. E. 418, L.R.A.1915F, 898, Ann. Cas. 1917D, 517; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 221, 152 N. W. 513, Ann. Cas. 1917B, 1205; State v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706; Baskin v. State, 107 Okla. 272, 232 P. 388, 40 A.L.R. 941; Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781) citing R. C. L.; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

Annotation: 3 A.L.R. 451; 69 A.L.R. 266.

Our constitution and fabric of government divide governmental powers into three grand divisions and prohibit the assumption by those exercising the powers of one of them of the just powers of another. Butler v. Printing Comrs. (Butler v. Darst) 68 W. Va. 493, 70 S. E. 119, 38 L.R.A.(N.S.) 653.

See State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612, for a discussion of the source of the doctrine of the separation of the powers of government.

See also infra, § 181, footnote 8.

[19] Norwalk Street R. Co's Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; State v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; McCrea v. Roberts, 89 Md. 238, 43 A. 39, 44 L.R.A. 485; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; State v. Fleming, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73.

Annotation: 69 A.L.R. 266.

[20] Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. ed. 97.

The difference between the departments is that the legislature makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments. Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

[1] Evans v. Gore, 253 U. S. 245, 64 L. ed. 887, 40 S. Ct. 550, 11 A.L.R. 519; Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181; People v. McCullough, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913B, 995.

Neither the legislative, executive, nor judicial department of the Federal government can lawfully exercise any authority beyond the limits marked out by the Constitution. Scott v. Sandford, 19 How. (U S.) 393, 15 L. ed. 691.

where one department of government attempts to exercise powers exclusively delegated to another;[2] officers of any branch of the government may not usurp or exercise the powers of either of the others.[3]

In making the constitutional distribution of the powers of government, the people assumed that the several departments would be equally careful to use the powers granted for the public good alone. Accordingly, the doctrine is generally accepted that none of the several departments is subordinate, but that all are co-ordinate,[4] coequal,[5] and potentially coextensive.[6]

A creature of the legislature designed to be a public corporation or agency for carrying on what may be deemed to be a function or department of government is unconstitutional as establishing a new department in contravention of constitutional amendments.[7]

§ 181. Separation of Powers Express or Implied.—Frequently, there appears in a state Constitution an express division of the powers of government among the three departments;[8] and all persons charged with official duties

[2] Snodgrass v. State, 67 Tex. Crim. Rep. 615, 150 S. W. 162, 41 L.R.A.(N.S.) 1144.

[3] State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329; State v. Fabbri, 98 Wash. 207, 167 P. 133, L.R.A.1918A, 416.

[4] Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L.R.A. 254, 60 Am. St. Rep. 691; Blalock v. Johnston, 180 S. C. 40, 185 S. E. 61, 105 A.L.R. 1115.

For general discussion of the independence of the several departments, see infra, § 185.

[5] Humphrey v. United States, 295 U. S. 602, 79 L. ed. 1611, 55 S. Ct. 869.

[6] Per Marshall, Ch. J., Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

[7] Opinion of Justices, 271 Mass. 582, 171 N. E. 294, 69 A.L.R. 388.

[8] Porter v. Investors' Syndicate, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132 (Montana Constitution); Abbott v. McNutt, 218 Cal. 225, 22 P. (2d) 510, 89 A.L.R. 1109; Re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 960, 32 L.R.A.(N.S.) 639; Re Speer 53 Idaho. 293, 23 P. (2d) 239, 88 A.L.R. 1086; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Fergus v. Marks, 321 Ill. 510, 152 N. E. 557, 46 A.L.R. 960; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222; Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077; State ex rel. Young v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; Harris v. Allegany County, 130 Md. 488, 100 A. 733, L.R.A.1917E, 824; Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770; University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; State ex rel. Hadley v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 439; State v. Field, 17 Mo. 529, 59 Am. Dec. 275; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Folimer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L.R.A.(N.S.) 350; State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1; State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680, 39 A.L.R. 1169; Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706; Hopper v. Oklahoma County, 43 Okla. 288, 143 P. 4, L.R.A.1915B, 875; Threadgill v. Cross, 26 Okla. 403, 109 P. 558, 138 Am. St. Rep. 964; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; State v. George, 22 Or. 142, 29 P. 356, 16 L.R.A. 737, 29 Am. St. Rep. 586; Biggs v. McBride, 17 Or. 640, 21 P. 878, 5 L.R.A. 115; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L.R.A. 504; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L.R.A. 243; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534. See also State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680, 39 A.L.R. 1169.

Annotation: 69 A.L.R. 266; 89 A.L.R. 1114, 1115; 79 L. ed. 476; 32 L.R.A.(N.S.) 639.

The origin of a constitutional provision decreeing a separation of powers is very well known. It first found expression, at least with clarity and precision, in the writings of Montesquieu, with which the members of the Federal Constitutional Convention of 1787 were familiar, early appeared in the organic laws of some of the states and was adopted as a basic principle in the Constitution of the United States in 1787, from which it entered into the Constitutions of nearly all of the states, including that of Texas, both as a republic and as a state. Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

The constitutional provision distributing the power of government into departments

under one of the departments may be forbidden from exercising any of the functions of another except as expressly permitted by the Constitution itself.[9] The Constitution may, however, make it a duty for officers of one department of the government to assist in the functions of another department, and laws passed in furtherance of such acts are not violative of the doctrine of separation of powers. Thus, a statute requiring the governor to secure the introduction into the legislature of budget bills prepared by the budget commission and cause amendments to be presented, if desirable, during the passage of the bill is not invalid on the theory that it attempts to confer power on the governor and budget commission to dictate the introduction of bills in the legislature, where the Constitution makes it the governor's duty to recommend for the consideration of the legislature such measures as he may deem expedient, and also makes it the duty of the officials who constitute the budget commission to prepare a general revenue bill to be presented to the house of representatives by the governor.[10]

On the other hand, in the Federal Constitution[11] and a few of the state Constitutions[12] no specific provision is made for a separation of governmental powers. Under these Constitutions, however, and even under the Constitutions in which such a clause has actually been inserted, irrespective of the existence of such a distributing clause, it is held that the creation of the three departments may operate as an apportionment of the different classes of powers. It has been said that where the provision that the legislative, executive, and judicial powers shall be preserved separate and distinct is not found in a Constitution in terms, it may exist there in substance in the organization and distribution of the powers of the department.[13] The basis of this theory is that the distribution of the powers of the state by the Constitution to the legislative, executive,

is not violated by a statute excluding Greek letter fraternities from state schools. University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A.1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720.

[9] Porter v. Investors' Syndicate, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132 (Montana Constitution); Montgomery v. State, 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; Abbott v. McNutt, 218 Cal. 225, 22 P. (2d) 510, 89 A.L.R. 1109; Re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; Singleton v. State, 38 Fla. 297, 21 So. 21, 34 L.R.A. 251, 56 Am. St. Rep. 177; Re Speer, 53 Idaho. 293, 23 P. (2d) 239, 88 A.L.R. 1086; State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; Re Dennett, 32 Me. 508, 54 Am. Dec. 602; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; Fergus v. Marks, 321 Ill. 510, 152 N. E. 557, 46 A.L.R. 960; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077; Harris v. Allegany County, 130 Md. 488, 100 A. 733, L.R.A.1917E, 824; Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770; State ex rel. Hadley v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151; State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1; Riley v. Carter 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018; Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706; Hopper v. Oklahoma County, 43 Okla. 288, 143 P. 4, L.R.A.1915B, 875; Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L.R.A. 504; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

Annotation: 69 A.L.R. 266, 267; 89 A.L.R. 1115; 79 L. ed. 476.

[10] Tayloe v. Davis, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052.

[11] Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480.

Annotation: 79 L. ed. 476.

[12] Re Sims, 54 Kan. 1, 37 P. 135, 25 L.R.A. 110, 45 Am. St. Rep. 261 (Kansas Constitution).

Ohio, for another example, has no specific constitutional provision for a separation of powers.

[13] Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480 (Federal Constitution); State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425; Zanesville v. Zanesville Teleg. & Teleph. Co. 64 Ohio St. 67, 59 N. E. 781, 52 L.R.A. 150, 83 Am St. Rep. 725; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628.

and judicial departments operates by implication as an inhibition against the imposition upon any one department of such powers which distinctively belong to one of the other departments.[14] It has also been said that the mere apportionment of sovereign powers among the three co-ordinate branches of the government, without more, imposes upon each of those branches the affirmative duty of exercising its own peculiar powers for itself, and prohibits the delegation of any of those powers, except in cases expressly permitted.[15]

A distributive clause in a state Constitution prevents the exercise of the functions of one department of the government by another department, but has no relation to the exercise or division of the powers of one particular branch of the government by the officers which comprise that branch and does not control the question as to which one of several executive officers should perform an executive function.[16]

The constitutional requirement with respect to the separation of the three departments of the government which exists in a state Constitution is generally held to refer to the state government and state officers, and not to the government of municipal corporations or their officers.[17]

§ 182. Importance of Separation of Powers of Government.—It has been said that the principle of the separation of the powers of government is fundamental to the very existence of constitutional government as established in the United States.[18] This principle has been referred to as one of the chief merits of the American system of written constitutions.[19] One court has declared that the division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people.[20] One of America's most distinguished jurists, moreover, stated that no maxim has been more universally received and cherished as a vital principle of freedom.[1]

Although there may be a blending of powers in certain respects,[2] in a broad sense the safety of our institutions depends in no small degree on the strict observance of the independence of the several departments.[3] The Supreme

[14] Zanesville v. Zanesville Teleg. & Teleph. Co. 64 Ohio St. 67, 59 N. E. 781, 52 L.R.A. 150, 83 Am. St. Rep. 725.

[15] Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L.R.A. 725, overruled on another point in Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469, 3 L.R.A.(N.S.) 837.

As to the delegation of powers, see infra, §§ 214 et seq.

[16] Follmer v. State, 94 Neb. 217, 142 N. W. 908, Ann. Cas. 1914D, 151.

[17] Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718 (statute providing commission and city manager forms of government for cities); State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Barnes v. Kirksville, 266 Mo. 270, 180 S. W. 545, Ann. Cas. 1917C, 1121; State v. Neble, 82 Neb. 267, 117 N. W. 723, 19 L.R.A.(N.S.) 578; Greenville v. Pridmore, 86 S. C. 442, 68 S. E. 636, 138 Am. St. Rep. 1058; Walker v. Spokane, 62 Wash. 312, 113 P. 775, Ann. Cas. 1912C, 994.

Annotation: 67 A.L.R. 740; 41 L.R.A. (N.S.) 111.

[18] Norwalk Street R. Co's Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L.R.A.(N.S.) 350; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

[19] O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; People v. Brady, 40 Cal. 198, 6 Am. Rep. 604; State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257.

[20] Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257.

[1] Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291 (per Kent, Ch. J.).

[2] See infra, § 183.

[3] McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Ex parte Kair, 28 Nev. 127, 425, 80 P. 463, 82 P. 453, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; State ex rel. Schorr v. Kennedy, 132 Ohio St. 510, 9 N. E. (2d) 278, 110 A.L.R. 1428; U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; State v.

Court has laid down the rule that each of the three departments of government should be kept completely independent of the others, so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the others.[4] Each constitutes thereby a check upon the exercise of its power by any other department.[5] Accordingly, a concentration of power in the hands of one person or class is prevented[6] and a commingling of essentially different powers in the same hands is precluded.[7] No arbitrary and unlimited power is vested in any department;[8] such power is regarded as a condition subversive of the Constitution[9] and the chief characteristic and evil of tyrannical and despotic forms of government.[10]

§ 183. Blending of Powers in Certain Respects.—The true meaning of the general principle of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments.[11] It has been held that this doctrine should be applied only to the powers which because of their nature are assigned by the Constitution itself to one of the departments exclusively.[12] Hence, it does not necessarily follow that an entire and complete separation either is desirable or was ever intended.[13] The courts have perceived the necessity of avoiding a narrow construction of the state constitutional provision for the division of the powers of the government into three distinct departments, for it is impractical to view the provision from the standpoint of a doctrinaire.[14]

For the foregoing reasons, the doctrine as to the separation of the powers of government has never been strictly applied to all the ramifications of the National Government. The duties of the officers of the several departments have, to some extent at least, overlapped and interlaced until it is hard to say in some cases where the one leaves off and the other begins.[15] For example, the President is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of Congress. This, how-

Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

[4] Humphrey v. United States, 295 U. S. 602, 79 L. ed. 1611, 55 S. Ct. 869; O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740.

[5] Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L.R.A. 369, 31 Am. St. Rep. 284; Re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855.

[6] State v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570.

[7] O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740.

[8] State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

[9] Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; State v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662.

[10] State v. Barker, 116 Iowa. 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222; State v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662; State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425.

[11] Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 S. Ct. 28; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; Henrico County v. Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001.

[12] State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

[13] Ex parte Grossman, 267 U. S. 87, 69 L. ed. 527, 45 S. Ct. 332, 38 A.L.R. 131; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; Re Sims, 54 Kan. 1, 37 P. 135, 25 L.R.A. 110, 45 Am. St. Rep. 261 (per Johnston, J., concurring); Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

"It sometimes happens that power properly belonging to one department is exercised by another department, but properly, and only, as an incident to its own legitimate functions." Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052.

[14] Re Hull, 163 Minn. 439, 204 N. W. 534, 205 N. W. 613, 49 A.L.R. 320, writ of error dismissed in 275 U. S. 491, 72 L. ed. 390, 48 S. Ct. 33.

[15] Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

ever, is so only to a limited extent, for a bill may become a law, notwithstanding the refusal of the President to approve it, by a vote of two thirds of each house of the legislature. So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment. In the main, however, the Constitution of the United States has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.[16]

The operation of the main principle subject to a blending of powers in certain specific instances is also illustrated in those cases which have dealt with the general subject in construing state constitutional provisions,[17] for it has been said that there is not a Constitution of any one of the states which does not to a certain extent blend the powers of government notwithstanding declarations in bills of rights to the contrary.[18] The several departments are not kept wholly separate and unmixed by any of the state Constitutions. In some of them the executive was, at one time, appointed by the legislature, and the judiciary, in some, is appointed by the executive, and in others the powers of the several departments are still more blended and mingled together.[19] There may also be a case where a particular power cannot be affirmed to be either executive, legislative, or judicial; and if such power is not by the Constitution unequivocally intrusted to either the executive or judicial departments, the mode of its exercise and the agency must necessarily be determined by the legislature.[20]

It is clear that blended or mixed powers as such are not recognized under the constitutional provisions as to the separation of powers of government.[1] An officer whose duties appertain exclusively to one department of government may not exercise power and perform functions and duties appertaining exclusively to another department, where the Constitution provides that no member of any of the three departments, legislative, executive, and judicial, shall exercise any power properly belonging to either of the others.[2] In this connection, however, it has been said that a constitutional provision forbidding the exercise by an officer of one department of any powers belonging to another is not to be construed as a declaration that every act pertaining to the government must be exercised exclusively by officers belonging to one of the particular

16 Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

17 Riggs v. Martin, 5 Ark. 506, 41 Am. Dec. 103; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Klafter v. State Examiners, 259 Ill. 15, 102 N. E. 193, 46 L.R.A. (N.S.) 532, Ann. Cas. 1914B, 1221; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525; Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148; State ex rel. Thompson v. Neble, 82 Neb. 267, 117 N. W. 723, 19 L.R.A.(N.S.) 578; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; Biggs v. McBride, 17 Or. 640, 21 P. 878, 5 L.R.A. 115; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821.

Annotation: 79 L. ed. 479, 480; 19 L.R.A. (N.S.) 579.

18 Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 S. Ct. 28; Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

19 Crane v. Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

20 State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

1 Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567.

2 Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.

departments.[3] Frequently, there are functions which are performed by one or another of these departments of such a character that their performance does not necessarily belong to it; and where such is the case, the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function.[4] Thus, a distributive provision in the Constitution is not infringed by the appointment of a member of the legislature as auditor of the board of railroad commissioners, where he is wholly subject to the power of the board, and having no powers, can exercise none.[5] Similarly, a statute conferring the power to appoint state highway commissioners upon a board of which the lieutenant governor of the state is a member is not unconstitutional as an attempt to confer executive power upon a legislative officer, notwithstanding the lieutenant governor is president of the senate, by virtue of his office, with power, when the senate is equally divided, to cast the deciding vote.[6]

§ 184. Effect of Federal Constitution on State Governments.—The Constitution of the United States does not in terms prohibit one department of the government of a state from exercising the powers which are conferred upon either of the other departments.[7] Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state,[8] which may distribute its powers as it sees fit, provided it acts consistently with due process and does not transgress restrictions of the Federal Constitution applicable to state authority.[9] The blending of the powers of different departments in the same official does not violate the guaranty of a republican form of government.[10] A state constitution may therefore unite certain legislative and judicial powers in a single person without violating the requirements of the Federal Constitu-

3 Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98.

4 Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98. See Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

In determining what Congress may do in seeking assistance from another branch of the government, the extent and character of that assistance must be fixed according to the common sense and the inherent necessities of the governmental coordination. J. W. Hampton, Jr., & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348.

In all of the state Constitutions, the legislative, judicial, and executive functions are vested in different departments. Though one department may perform acts which, in substance, are of the character of another, yet this may be done only when coupled with its own paramount power and in use of some discretion essential to its existence. Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873.

5 State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583.

6 Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.

Annotation: 70 A.L.R. 1095.

7 State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425.

Annotation: 79 L. ed. 478.

8 Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. ed. 835, 57 S. Ct. 549; Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 S. Ct. 28; Livingston v. Moore, 7 Pet. (U. S.) 469, 8 L. ed. 751; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639.

9 Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598, 52 S. Ct. 285.

10 Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. ed. 835, 57 S. Ct. 549; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A. (N.S.) 713, 14 Ann. Cas. 606.

Annotation: 79 L. ed. 478.

A Virginia statute establishing a milk commission with power to create within the state natural market areas and to fix the minimum and maximum prices to be charged for milk and cream therein, authorizing the commission to exact a license from distributors subject to the act, providing that in the absence of such a license sales shall be unlawful within the market areas, and imposing taxes or fees for the support of the commission and of local milk boards co-operating with the commission, is not a denial of the republican form of government guaranteed to the states by the U. S. Const. Art. 4, § 4. Highland Farms Dairy v. Agnew, 300 U. S. 608, 81 L. ed. 835, 57 S. Ct. 549.

tion.[11] Moreover, there is nothing in the Constitution which prohibits the legislature of a state or territory from exercising judicial functions.[12]

2. Independence of the Several Departments

a. In General

§ 185. Generally.—Each of the several departments of government derives its authority directly or indirectly from the people and is responsible to them.[13] Each has exclusive cognizance of the matters within its jurisdiction[14] and is supreme within its own sphere.[15] In the exercise of the powers of government assigned to them severally, the departments operate harmoniously and independently of each other, and the action of any one of them in the lawful exercise of its own powers is not subject to control by either of the others.[16]

The grant of legislative power to the legislative department of government, though in broad language, does not override the provision of the Declaration of Rights that the powers of each department of government shall not be exercised by any other department.[17] Moreover, each department of government must exercise its own delegated powers. Unless otherwise limited by the Constitution, each exercises such inherent power as will protect it in the performance of its major duty, and, furthermore, one department may not be controlled or even embarrassed by another department unless the Constitution so ordains.[18]

The completeness of the separation of the three departments and their mutual independence does not extend to the point that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the state government,[19] since each department is to a limited extent affected by the action of the other depart-

[11] O'Donoghue v. United States, 289 U. S. 516, 77 L. ed. 1356, 53 S. Ct. 740; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 S. Ct. 28; Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 221, 152 N. W. 513, Ann. Cas. 1917B, 1205.

[12] Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458.
See infra, § 191.

[13] Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570; Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796; State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[14] Fox v. McDonald, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529, 46 Am. St. Rep. 98; White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L.R.A. 402; State v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; State v. Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567.

[15] Montgomery v. State, 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; People ex rel. Billings v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; State v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L.R.A. 567; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628; State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[16] Parsons v. Tuolomne County Water Co. 5 Cal. 43, 63 Am. Dec. 76; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; People v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218; Blalock v. Johnston, 180 S. C. 40, 185 S. E. 51, 105 A.L.R. 1115; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.
Annotation: 63 Am. Dec. 77.

[17] Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

[18] State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218.

[19] White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L.R.A. 402.

ments.[20] Such limited control over the other departments is illustrated by the power of the legislative department to enact laws by which both the other departments are controlled and bound. The chief executive has a qualified veto power upon legislative action and has the right to convene the legislature when he chooses. He also may practically annul the judgments of the judiciary in certain cases, by the exercise of the pardoning power.[1]

In the application of these general principles, complex and difficult questions of constitutional law have arisen. Upon a true understanding of these fundamental principles depends the solution of problems as to the extent to which the legislature may exercise nonlegislative functions and the extent to which nonjudicial functions may be imposed upon the judiciary. The whole subject of the delegation of powers by any of the departments of government is likewise dependent on the correct application of these principles.[2]

b. Executive as Separate Department

§ 186. Generally.—In the allotment of the powers of state government to the three departments,[3] the executive power is placed in the hands of the governor.[4] Certain powers, such as the right to issue pardons, are generally considered as belonging exclusively to the chief executive officer of the state.[5] The due execution of county bonds is also an executive act.[6]

Other powers which originally were part of the prerogative of royalty, such as the right to make appointments to public office, may under certain circumstances be exercised by other departments.[7] While it is generally conceded that the power to appoint to a public office is in its nature an executive function,[8] appointments to office are often made by judicial officers in the discharge of their official duties, and likewise, appointments are made by the legislature

[20] Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L.R.A. 369, 31 Am. St. Rep. 284; People v. Bissell, 19 Ill. 229, 68 Am. Dec. 591.

[1] People v. Bissell, 19 Ill. 229, 68 Am. Dec. 591.
Although the chief executive official usually has the veto power in the enactment of laws, this power is legislative and not executive in character. Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008.
As to the executive power of convening the legislature, see Governor [Also 12 R. C. L. p. 1005, § 7].
As to the pardoning power, see Pardon, Reprieve, and Amnesty [Also 20 R. C. L. p. 525, §§ 7 et seq.].
As to the veto power and its exercise, see Statutes [Also 25 R. C. L. p. 888, § 138].

[2] Each of the more important applications of the doctrine of the separation of the powers of government is considered in its appropriate place in this article. For the extent to which the judicial department may interfere with the action of other departments to enforce the Constitution, see supra, §§ 86 et seq.; for the extent to which the legislature may interfere with the courts, see infra, §§ 206 et seq.; for the imposition of nonjudicial functions on courts, see infra, §§ 225 et seq.; and for the whole subject of the delegation of particular powers of government, see infra, §§ 214 et seq.

[3] See supra, §§ 180 et seq.

[4] State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; State v. Denny, 118 Ind. 449, 4 L.R.A. 65; Veto Case, 69 Mont. 325, 222 P. 428, 35 A.L.R. 592.
For a general discussion of the executive powers under the state government, see Governor [Also 12 R. C. L. p. 1001, §§ 4 et seq.].

[5] Miner v. United States (C. C. A. 3d) 244 F. 422, 3 A.L.R. 995; State v. Sloss, 25 Mo. 291, 69 Am. Dec. 467; Snodgrass v. State, 67 Tex. Crim. Rep. 615, 150 S. W. 162, 41 L.R.A.(N.S.) 1144.
See Pardon, Reprieve, and Amnesty [Also 20 R. C. L. p. 525, §§ 7 et seq.].

[6] Hoff v. Jasper County, 110 U. S. 53, 28 L. ed. 68, 3 S. Ct. 416.

[7] Lasher v. People, 183 Ill. 226, 55 N. E. 663, 47 L.R.A. 802, 75 Am. St. Rep. 103.
For details, see Public Officers [Also 22 R. C. L. p. 424, §§ 73 et seq.].

[8] Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480; Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425; State v. Neble, 82 Neb. 267, 117 N. W. 723, 19 L.R.A.(N.S.) 578.
Annotation: 19 L.R.A.(N.S.) 579.
The power to appoint to office is not a legislative function, but belongs to the executive department of the government. Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93.

of officers necessary to enable it to discharge properly its duties as an independent legislative body. Such appointments by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the function of any other branch. But the appointment to an office by the legislature or judiciary, where it is in no manner connected with the discharge of legislative or judicial duties, is in some jurisdictions treated as an exercise of executive functions and is prohibited.[9]

The same principles have been applied to the performance of administrative duties by the several departments of government or the legislature. Administrative duties are frequently required to be performed in order to give full operation to, and to make effective the respective powers of, the legislative and judicial as well as the executive department. An administrative officer may properly assist any of the departments in making the exercise of the powers appertaining to each complete in operation and effective in enforcement.[10]

Although in accordance with the general principles of the separation of powers,[11] the executive department cannot generally exercise judicial or legislative power,[12] in certain particular instances the chief executive apparently possesses powers not completely executive in nature, which must be exercised by him and not by a subordinate. This is, at any rate, the perceptible effect of a Supreme Court decision that the President of the United States exercises a judicial, and not an administrative, power in effecting a sentence of dismissal of an officer of the army, arising out of court-martial in times of peace, and this duty cannot be delegated to an administrative officer, such as the Secretary of War.[13]

§ 187. Legislative Encroachment upon Executive Power.—It is a fundamental principle of the American governmental system that the legislature cannot usurp the powers of the executive department by exercising functions of the latter.[14] Thus, a state legislature may not confer purely executive power on a committee of its own members.[15] The appointment of managers of government property or business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members.[16] The legislature can neither enforce the laws which it has the power to make nor, in the usual instance, appoint the agents charged with the duty of such enforcement.[17] Similarly, an initiative petition to call an extraordinary session of the legislature—if it is considered as having passed and become a statute—is invalid because it violates constitutional provisions for the calling of a special session of the legislature by the governor, since it is an attempted usurpation by the legislature of executive power.[18]

[9] State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65.
Appointment of officers which are in no way connected with the discharge of legislative or judicial duties involves the exercise of executive functions. State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79.

[10] State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Spartanburg County v. Miller, 135 S. C. 348, 132 S. E. 673, citing R. C. L.

[11] See supra, §§ 180 et seq.

[12] Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

[13] Runkle v. United States, 122 U. S. 543, 30 L. ed. 1167, 7 S. Ct. 1141.

[14] Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052; State ex rel. Hadley v. Washburn, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

[15] Stockman v. Leddy, 55 Colo. 24, 129 P. 220, Ann. Cas. 1916B, 1052.

[16] Springer v. Philippine Islands, 277 U. S. 189, 72 L. ed. 845, 48 S. Ct. 480.

[17] Ibid.

[18] Simpson v. Hill, 128 Okla. 269, 263 P. 635, 56 A.L.R. 706.

Another fundamental rule is that the legislature may not usurp the constitutional powers of the executive department by interference with the functions conferred on that department by the organic law. In a well-considered opinion, the Supreme Court has held that Congress cannot take away from the executive department the power to dismiss a purely executive officer appointed by that department, even though the appointment was made by and with the advice and consent of the Senate;[19] nor can it make it a condition of such dismissal that the advice and consent of the Senate be necessary to effect it.[20] In many instances, however, acts of the legislature have been held not to constitute interference with executive powers. For example, no invalid interference with the constitutional functions of the President in connection with matters involved in the relations between this country and the Republic of Mexico resulted from an act of Congress providing for a suit in the court of claims to determine as to the matter of fraud in obtaining an award against Mexico, the amount of which had been paid by Mexico to the United States for the claimants.[1] Similarly, a naval appropriation act of Congress, changing the name of appointees of the Naval Academy and modifying the scope of their duties, but not undertaking to name the incumbent of any office, is not invalid as assuming the power of appointment which belongs to the executive.[2]

The kind of office to be occupied by an appointee, the nature of the duties, or the skill required of an officeholder may affect the conclusions of the courts that the legislature can either curtail executive action in relation thereto or itself prescribe conditions affecting the holding of the office. The Supreme Court has held, for instance, that no unconstitutional limitation is imposed upon the executive powers of the President by the provisions of the Federal Trade Commission Act which restrict his power to remove a member of the Commission to the specific causes there enumerated, since, though appointed by the President with the advice and consent of the Senate, such a member is not an executive officer, but one charged with quasi-legislative and quasi-judicial functions.[3] The legislature also has the power to place the assistants of the secretary of state under the operation of a civil service statute.[4] It may further provide for the assignment for duty of a Federal judge from one district and circuit to another, even though the power of appointment of such judges is vested in the President, to be confirmed by the Senate.[5]

§ 188. Imposition of Executive Functions on Judiciary by Legislature.—A state Constitution which provides that the legislative, executive, and judicial departments, respectively, shall not exercise the powers of one another prohibits the legislature, in the exercise of its legislative powers, from transferring from the executive to the judicial department powers expressly and exclusively conferred upon the executive department by the Constitution.[6] An old age pension law which attempts to intrust to the courts, in the administration of the system set up, a part of the authority theretofore exercised

[19] Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21 (Tenure of Office Act of 1867).

[20] Myers v. United States, 272 U. S. 52, 71 L. ed. 160, 47 S. Ct. 21.

[1] La Abra Silver Min. Co. v. United States, 175 U. S. 423, 44 L. ed. 223, 20 S. Ct. 168.

[2] Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 S. Ct. 431.

[3] Humphrey v. United States, 295 U. S. 602, 79 L. ed. 1611, 55 S. Ct. 869.

[4] People ex rel. Gullett v. McCullough, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913B, 995.

[5] Lamar v. United States, 241 U. S. 103, 60 L. ed. 912, 36 S. Ct. 535.

[6] Montgomery v. State, 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394 (suspension of sentence); State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174 (appointment of legal examiners); Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

by local administrative or executive officers contravenes the Constitution in granting to the judicial branch of the government authority which clearly belongs to the executive.[7] If the removal of a sheriff by the governor is an executive function, a statutory provision for review of his action by the courts would be unconstitutional as an attempt to invest the judiciary with a function of the executive department.[8] The preparation for, and conduct of, a criminal case on behalf of the people are acts executive and administrative in character to be performed by the prosecuting attorney and cannot by statutory enactment be granted to, or imposed upon, the judiciary.[9]

In some instances the Constitution may provide for the imposition by the legislature upon the judiciary of duties somewhat executive in character, but closely related to the judicial department. Thus, where the Constitution provides that judges shall perform only judicial functions "except as herein provided" and also gives to the legislature the power to provide for the drawing of juries for the trial of criminal and civil cases, the legislature can give to the judges of the parishes the right to appoint jury commissioners, and the exercise of this authority by the judges cannot be said to be such an executive function as to violate the Constitution.[10] The selection of a jury commission is also more in the nature of a judicial that an executive function, since it is intimately connected with the organization of the court.[11] A like exception apparently exists where the power is in its essence judicial in nature. Thus, where the power conferred upon the governor of a state to remove an officer is judicial in character, a provision in the statute conferring the power for an appeal from his decision to the courts is not unconstitutional as an attempt to confer an executive function upon the judiciary.[12] Similarly, conferring upon the courts power to relieve from forfeiture of a recognizance does not conflict with power properly belonging to the executive department of the government.[13] A statute is not invalid as improperly conferring executive powers where the actual power of the executive department is not really diminished. The province of the district attorney, whose duty it is to prepare criminal cases on behalf of the state, is not unconstitutionally invaded by a statute providing for the appointment of experts by the court whenever, in any criminal case, expert opinion evidence becomes necessary or desirable, for such a statute does not interfere with the right of the district attorney to call on behalf of the state such experts as he sees fit.[14] A great many authorities have also taken the position that the exercise of the power of appointment to certain offices by the judiciary is not an encroachment on the power of the executive department, and that consequently statutes providing for the appointment of such officers by judges do not violate constitutional provisions providing for a separation of powers.[15]

§ 189. Judicial Encroachment upon Executive Functions.—The judiciary may not encroach upon the constitutional powers of the executive depart-

[7] Annotation: 86 A.L.R. 913.

[8] State ex rel. Richards v. Ballentine, 152 S. C. 365, 150 S. E. 46, 66 A.L.R. 574.
Annotation: 66 A.L.R. 586.

[9] People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L.R.A.(N.S.) 917, Ann. Cas. 1912B, 688.

[10] State v. Jackson, 134 La. 599, 64 So. 481, Ann. Cas. 1916B, 27.

[11] Ibid.

[12] State ex rel. Richards v. Ballentine, 152 S. C. 365, 150 S. E. 46, 66 A.L.R. 574.
Annotation: 66 A.L.R. 586.

[13] People v. Evanuk, 320 Ill. 336, 150 N. E. 634, 43 A.L.R. 1230.

[14] Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.

[15] Annotation: 8 Ann. Cas. 599; 10 Ann. Cas. 436; 18 Ann. Cas. 1189.
As to the general principles concerning the nature of the power to appoint to office, see supra, § 186.

ment.[16] Thus, the issuance of an injunction by a District Court against the lieutenant governor, preventing him from assuming duties as acting governor, is an encroachment upon the executive department and an attempt to pass upon questions solely within the province of the other governmental departments, and prohibition will lie to prevent this unwarranted and unauthorized application of judicial force.[17] Such encroachment cannot be accomplished by judicial review of purely executive powers such as the granting of reprieves and pardons.[18] No usurpation of the pardoning power of the executive is involved, however, in the action of a court, at the term in which sentence was imposed, in reducing the punishment after the prisoner has served a part of the imprisonment originally imposed[19] or by the suspension of sentence.[20]

§ 190. Judicial Interference with Executive Department.—Closely akin to the problem of judicial encroachment upon executive power is the situation in which an attempt is made to obtain judicial interference in executive functions. It is a general rule that the courts are without the power to interfere in the performance of executive duties, particularly where the executive must exercise discretion in the performance of constitutional or statutory powers.[1] The executive power of the Federal Government is vested in a President, and, as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed in the Constitution, through the impeaching power.[2] A state's judiciary sustains the same relations to its governor that the Federal judiciary does to the President of the United States; and as a state court, by reason of that relation, has no jurisdiction to coerce or restrain the governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official actions of the President.[3]

It is the rule in some jurisdictions that under a constitutional provision that

[16] State v. Magee Pub. Co. 29 N. M. 455, 224 P. 1028, 38 A.L.R. 142.
The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. Oetjen v. Central Leather Co. 246 U. S. 297, 62 L. ed. 726, 38 S. Ct. 309.
Who is the sovereign de jure or de facto of a territory is not a judicial question, but is a political one, the determination of which by the legislative and executive departments of any government conclusively binds the judges. Ricaud v. American Metal Co. 246 U. S. 304, 62 L. ed. 733, 38 S. Ct. 312; Oetjen v. Central Leather Co. 246 U. S. 297, 62 L. ed. 726, 38 S. Ct. 309.

[17] State ex rel. Trapp v. Chambers, 96 Okla. 78, 220 P. 890, 30 A.L.R. 1144.

[18] State v. Magee Pub. Co. 29 N. M. 455, 224 P. 1028, 38 A.L.R. 142; Snodgrass v. State, 67 Tex. Crim. Rep. 615, 150 S. W. 162, 41 L.R.A.(N.S.) 1144.

[19] United States v. Benz, 282 U. S. 304, 75 L. ed. 354, 51 S. Ct. 113.

[20] See CRIMINAL LAW.

[1] Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 S. Ct. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 S. Ct. 155; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 S. Ct. 197; Decatur v. Paulding, 14 Pet. (U. S.) 497, 10 L. ed. 559; Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346; State Railroad Commission v. People, 44 Colo. 345, 98 P. 7, 22 L.R.A.(N.S.) 810; Pike v. State Land Comrs. 19 Idaho, 268, 113 P. 447, Ann. Cas. 1912B, 1344; Perry v. O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100; Re McDonald, 49 Mont. 454, 143 P. 947, L.R.A.1915B, 988, Ann. Cas. 1916A, 1166; Hartranft's Appeal, 85 Pa. 433, 27 Am. Rep. 667; State ex rel. Davern v. Rose, 140 Wis. 360, 122 N. W. 751, 28 L.R.A. (N.S.) 194.
For a general discussion of the power of the courts to compel executive action, see MANDAMUS [Also 18 R. C. L. p. 189, §§ 113 et seq.].

[2] Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181; People v. McCullough, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913B, 995.
The right of a naval officer, disabled in the line of duty, to retirement on pay is by statute dependent on the judgment of the President of the United States, over which the courts have no control. Denby v. Berry, 263 U. S. 29, 68 L. ed. 148, 44 S. Ct. 74.

[3] Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec 346; Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L.R.A. 316.
Annotation: 3 L.R.A. 316.

the three departments of the government shall be distinct and that no one branch can interfere with the duties of the others, a writ of mandamus will not lie to compel official action by a governor, whether the act is of the kind regarded as ministerial or otherwise.[4] Under this view, such a writ is not issuable against an executive for the purpose of compelling him to perform a duty, even though such duty is imposed upon him by statute.[5] In most jurisdictions, however, exceptions to the rule are recognized. Thus, it has been held that if, in the exercise of some power neither political nor essentially governmental, the law specially enjoins upon the governor the performance of some particular act, under circumstances in which he has no discretion, and he refuses to perform the act, and by his refusal a party is deprived of his property or other legal right, the injured party may have relief by mandamus against the governor if there is no plain, speedy, and adequate remedy in the ordinary course of law.[6]

It is generally recognized that the doctrine that the court will not reach the governor in the performance of his duties or anyone acting under his direction and by his authority with respect to any matter applies only to acts within the scope of executive authority; outside thereof the principle of equality before the law renders him and his agent liable to judicial remedies the same as any other person, except in so far as the dignity of his office should, and does, protect him and his agent to some extent from coercive interference by judicial mandate.[7]

c. Legislature as Separate Department

§ 191. Generally.—The legislative is one of the three main departments of government, and under the principle of the separation of governmental powers,[8] the legislative power of the state is vested in the state legislature.[9] That body is vested with the whole of the legislative power of the state[10] and has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by constitutional provisions,[11] whether

[4] People v. Bissell, 19 Ill. 229, 68 Am. Dec. 591; State v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Rice v. Austin, 19 Minn. 103, Gil. 74, 18 Am. Rep. 330; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L.R.A. 194, 41 Am. St. Rep. 705; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L.R.A. 316.
Annotation: 3 L.R.A. 316.

[5] Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564.

[6] Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L.R.A. 369, 31 Am. St. Rep. 284; Denison v. State (Tex. Civ. App.) 61 S. W. (2d) 1017 (writ of error refused in 122 Tex. 459, 61 S. W. (2d) 1022), citing R. C. L.
The action of the governor of a state within his constitutional power is not reviewable by the courts, except where lawful rights of individuals are affected. State ex rel. Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 A.L.R. 988.

[7] Hearon v. Calus, 178 S. C. 381, 183 S. E. 13, citing R. C. L.; Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796.

[8] See supra, § 180.

[9] Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. (U. S.) 667, 21 L. ed. 375; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Norwalk Street R. Co's Appeal, 69 Conn. 576, 38 A. 708, 39 L.R.A. 794; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Stark County v. Henry County, 326 Ill. 535, 158 N. E. 116, 54 A.L.R. 777; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; State ex rel. Fletcher v. District Ct. 213 Iowa, 822, 238 N. W. 290, 80 A.L.R. 339; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105; State v. Field, 17 Mo. 529, 59 Am. Dec. 275; McAlister v. State, 95 Okla. 200, 219 P. 134, 33 A.L.R. 1370; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628; State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.
As to the legislative power of the United States as vested in Congress, see UNITED STATES [Also 26 R. C. L. p. 1419, §§ 7, 8].

[10] See infra, § 193.

[11] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723; Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Stark County v. Henry County, 326 Ill. 535, 158 N. E. 116, 54 A.L.R. 777; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; State ex rel. Fletcher v. District Ct. 213 Iowa, 822, 238 N. W. 290, 80 A.L.R. 339; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105; State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8.
Plenary power in the legislature for all purposes of civil government is the rule and a prohibition to exercise a particular power is an exception. Mason v. State, 58 Ohio St. 30, 50 N. E. 6, 41 L.R.A. 291.

[12] **United States.**—Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648.
Alabama.—Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.
Florida.—State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Munn v. Finger, 66 Fla. 572, 64 So. 271, 51 L.R.A.(N.S.) 631.
Illinois.—People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Stark County v. Henry County, 326 Ill. 535, 158 N. E. 116, 54 A.L.R. 777; People v. McCullough, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913B, 995; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; People v. Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; People v. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115.
Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A.(N.S.) 1190; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Doe ex dem. Chandler v. Douglass, 8 Blackf. 10, 44 Am. Dec. 732.
Iowa.—State ex rel. Fletcher v. District Ct. 213 Iowa, 822, 238 N. W. 290, 80 A.L.R. 339.
Kansas. — Ratcliff v. Wichita Union Stockyards Co. 74 Kan. 1, 86 P. 150, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016.
Kentucky.—Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.
Massachusetts.—Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.
Michigan.—Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105.
Missouri.—Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148.
Montana.—People ex rel. Boardman v. Butte, 4 Mont. 174, 1 P. 414, 47 Am. Rep. 346.
Nevada.—Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66.
New York.—Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813, affirmed in 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248.
North Dakota.—Strauss v. State, 36 N. D. 594, 162 N. W. 908, L.R.A.1917E, 909.
Ohio.—Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686.
Oregon.—Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; State v. George, 22 Or. 142, 29 P. 356, 16 L.R.A. 737, 29 Am. St. Rep. 586.
Pennsylvania. — Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515.
Rhode Island. — State v. Narragansett Dist. 16 R. I. 424, 16 A. 901, 3 L.R.A. 295.
South Carolina.—Mauldin v. Greenville, 42 S. C. 293, 20 S. E. 842, 27 L.R.A. 284, 46 Am. St. Rep. 723, overruled on another point in Mauldin v. Greenville, 53 S. C. 285, 31 S. E. 252, 43 L.R.A. 101, 69 Am. St. Rep. 855; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705.
South Dakota.—State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; In re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187, 91 Am. St. Rep. 674.
Tennessee.—Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126.
Utah.—Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628.
Virginia.—Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009; Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L.R.A. 676.
Wisconsin.—Nitka v. Western U. Teleg. Co. 149 Wis. 105, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863; State v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.
Wyoming.—Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364; State ex rel. Richardson v. Henderson, 4 Wyo. 535, 35 P. 517, 22 L.R.A. 751.
Annotation: 36 Am. St. Rep. 682.
See also infra, § 193.

[13] State ex rel. Harrison v. Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L.R.A. 408; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213.
For the supremacy of acts of Congress and treaties, see supra, §§ 42, 43.

state or Federal,[12] or by the valid treaties and acts of Congress.[13] In some states, due to the provisions of the local Constitution, the legislative authority is subject to the initiative and referendum provisions specifically reserved

to the people,[14] although the fact that by a state Constitution the people themselves may propose or enact laws in connection with the legislature in no manner prohibits the legislature from itself also enacting the same law that might be desired by the people.[15]

It has been said that a state legislature does not act under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the Constitution,[16] and that while its powers are deemed to be absolute,[17] this is so only within the scope of its allotted powers under the Constitution.[18] Nevertheless, so long as no constitutional limits are exceeded the legislative will is supreme and must be obeyed by all other departments of the government.[19]

§ 192. Illustrations of Legislative Authority.—Since the legislature possesses the authority to deal with any subject within the range of governmental activity, subject only to constitutional restrictions,[20] the scope of legislative activity embraces almost every conceivable field. Thus, the legislature has the authority to determine the public policy of the state[1] and in furtherance of any policy adopted by it may enact proper laws tending to induce conformance therewith.[2] Moreover, it may restrict transactions which are not of themselves obnoxious to public policy when they bear such an intimate relation to transactions which necessarily do violate public policy that the latter cannot be effectively curbed while the former are unrestricted.[3] A change of the law as it has been interpreted by the courts,[4] the regulation or change of the methods of conveyancing,[5] the regulation of criminal and civil proceedings and appeals[6] except in pending controversies,[7] the denomination and definition of what is a criminal offense[8] and the penalty to be imposed for its commission,[9] the suspen-

[14] Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

[15] State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

[16] People v. Seymour, 16 Cal. 332, 76 Am. Dec. 521; People v Coleman, 4 Cal. 46, 60 Am. Dec. 581, overruled on another point in People v. McCreery, 34 Cal. 432; State v. Camp Sing, 18 Mont. 128, 44 P. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663.

In Kansas, the courts have taken the position that the legislature has no inherent power, but only such as it derives from the people through the Constitution. State ex rel. Brewster v. Knapp, 99 Kan. 852, 163 P. 181, L.R.A.1917C, 1034.

As to the rule that state Constitutions are merely a limit on the powers of the legislature, see supra, § 18.

[17] See infra, § 193.

[18] Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 65 N. E. 885, 59 L.R.A. 775, 93 Am. St. Rep. 670.

Annotation: 40 Am. Dec. 281.

The test has been enunciated that in determining whether a particular act of the legislature violates a particular constitutional provision, the question is not whether the people, in adopting such provision, had in mind the act of the legislature in question and were attempting to authorize it, but whether, having in mind the possibility of some future attempt on the part of the legislature to enact such an act, they were attempting to frustrate it in advance. State v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111.

[19] State v. Birmingham So. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436.

[20] See supra, § 191.

Every title in this work which may be affected should be examined specifically for detailed treatment of the authority of the legislature as to the subject matter which the particular title embraces.

[1] See supra, § 139.

[2] Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412.

[3] Salem Lodge, F. & A. M. v. Swalls, — Ind. —, 197 N. E. 837, 108 A.L.R. 444.

[4] See infra, §§ 196, 198.

[5] Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A.L.R. 992.

[6] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507.

[7] See infra, § 211.

[8] Ex parte Bates, 20 N. M. 542, 151 P. 698, L.R.A.1916A, 1285.

It is the exclusive province of the legislature to declare what acts, deemed inimical to the public welfare, shall constitute a crime, to prohibit the same, and to impose appropriate punishments for a violation thereof. State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331.

[9] Miner v. United States (C. C. A. 8d)

sion of the writ of habeas corpus,[10] the regulation of elections,[11] the cancelation of liability of officers for money lost by them when such loss was not occasioned by their unfaithfulness or wilful misconduct,[12] and investigation into the management of the various institutions of the state and the departments of the state government are all legitimate functions of the legislature.[13] In its grant of charters the legislature has the same liberty of contract as an individual, except as limited by constitutional provisions.[14]

In those matters dealing primarily with governmental functions, the authority of the legislature is of the utmost significance. It possesses the authority to levy taxes,[15] which authority is usually regarded as exclusively vested in the legislature[16] and is altogether free from judicial interference until it appears to have exceeded the limits imposed by the Constitution.[17] Matters connected with condemnation proceedings are also under legislative prerogative. Where public uses are enumerated in a constitutional provision dealing with the power of eminent domain, the legislature may add to the public uses so enumerated, although it cannot annul or repeal any uses therein specified.[18] It may determine to what particular use a block of land which has been dedicated to the public use without the designation of a particular use shall be devoted, where no private rights have intervened.[19] It likewise controls public offices to a great extent. The creation of offices and the assignment of their compensation are legislative functions.[20] It may prescribe the mode of appointment to all offices created by it.[1] Moreover, at least in some instances, it may annex to a constitutional office other duties than those provided by the Constitution.[2] It also possesses authority for the creation of subordinate governmental agencies and the prescribing of their duties.[3]

The creation and formation of municipal corporations,[4] such as counties, cities, villages, and school districts, and the fixing of their boundaries are

244 F. 422, 3 A.L.R. 995; Ex parte Bates, 20 N. M. 542, 151 P. 698, L.R.A.1916A, 1285.

The power to declare what shall be the appropriate punishment for an ascertained crime belongs solely to the legislature. That body may provide a minimum and a maximum and leave it to the discretion of the jury to fix a definite term within these limits; or it may provide a single term, as is sometimes done, leaving nothing for the jury except to respond to the issue of guilty or not guilty. Woods v. State, 130 Tenn. 100, 169 S. W. 558, L.R.A.1915F, 531.

"To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions peculiarly belonging to the several states." Collins v. Johnston, 237 U. S. 502, 59 L. ed. 1071, 35 S. Ct. 649.

[10] Re McDonald, 49 Mont. 454, 143 P. 947, L.R.A.1915B, 988.

[11] People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562.

[12] Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97.

[13] Dickinson v. Johnson, 117 Ark. 582, 176 S. W. 116, L.R.A.1915E, 496, Ann. Cas. 1916B, 1067.

[14] Purdy v. Erie R. Co. 162 N. Y. 42, 56 N. E. 507, 48 L.R.A. 669, rehearing denied in 162 N. Y. 663, 57 N. E. 1122, writ of error dismissed in 185 U. S. 148, 46 L. ed. 847, 22 S. Ct. 605.

[15] Silven v. Osage County, 76 Kan. 687, 92 P. 604, 13 L.R.A.(N.S.) 716; Lewis & Clark County v. Industrial Acci. Bd. 52 Mont. 6, 155 P. 268, L.R.A.1916D, 628; Vallelly v. Park Comrs 16 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61.

[16] Preston v. Sturgis Mill. Co. (C. C. A. 6th) 183 F. 1, 32 L.R.A.(N.S.) 1020, writ of certiorari denied in 220 U. S. 610, 55 L. ed. 608, 31 S. Ct. 714; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853.

[17] Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408.

[18] Blackwell Lumber Co. v. Empire Mill Co. 28 Idaho, 556, 155 P. 680, Ann. Cas. 1918A, 189.

[19] Daughters v. Riley County, 81 Kan. 548, 106 P. 297, 27 L.R.A.(N.S.) 938.

[20] Cochnower v. United States, 248 U. S. 405, 63 L. ed. 328, 39 S. Ct. 137.

[1] State v. Jackson, 134 La. 599, 64 So. 481, Ann. Cas. 1916B, 27.

[2] Rouse v. Johnson, 234 Ky. 473, 28 S. W. (2d) 745, 70 A.L.R. 1077.

[3] White v. Decatur, 225 Ala. 646, 144 So. 873, 86 A.L.R. 914.

[4] Re North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L.R.A. 638.

legislative functions.[5] It thus has the power to define the limits of the cities and towns of the commonwealth[6] and also to define what shall be urban property and what shall be county property.[7] Primarily it has the exclusive right to lay out and establish public highways and direct the performance of the work necessary and incident to the discharge of the duty.[8]

Regulatory measures under the police power are exercised by every state government.[9] The legislature exercises this authority of the sovereign.[10] It prescribes the qualifications and establishes the rules and regulations for the pursuit of any calling or profession.[11] It further regulates and controls public utility corporations,[12] regulates the rate of interest,[13] and possesses authority to fix the rate of interest for additional compensation to be paid upon contractual or legal obligations because of delay in settlement.[14] Moreover, the power to declare what is a nuisance and to enact or bring into existence laws, regulations, powers, and remedies to destroy such a nuisance rests primarily with the legislative branch of the government.[15] Thus, the legislature of a state may declare the existence of San José scale to be a nuisance and may confer power upon local boards or tribunals to exercise the police power of the state to abate it when in the judgment of such tribunals the conditions exist which the legislature has declared constitute such nuisance.[16]

Whatever authority the legislature possesses, its exercise is always subject to protective constitutional restrictions in favor of the person. For example, it is beyond the power of the legislative branch of the government to transfer the title to land by mere legislative fiat.[17]

§ 193. Extent of Legislative Power.—In accordance with the doctrine that the state Constitution is not a grant of power, but only a limitation, as far as the legislature is concerned,[18] it is a recognized principle of constitutional law that except where limitations have been imposed by the Federal or state Constitution, the power of a state legislature is unlimited and practically

[5] Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056.

[6] Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40 (affirming 217 Pa. 227, 66 A. 348, 120 Am. St. Rep. 845); Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 S. Ct. 284 (affirming 59 Kan. 427, 53 P. 468, 52 L.R.A. 321); Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Valverde v. Shattuck, 19 Colo. 104, 34 P. 947, 41 Am. St. Rep. 208; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; True v. Davis, 133 Ill. 522, 22 N. E. 410, 6 L.R.A. 266; Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; Gernert v. Louisville, 155 Ky. 589, 159 S. W. 1163, 51 L.R.A.(N.S.) 363; North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530; Daly v. Morgan, 69 Md. 460, 16 A. 287, 1 L.R.A. 757; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Malone v. Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.

Annotation: 64 A.L.R. 1336.

Where it is perfectly clear that a boundary extension act constitutes a palpably arbitrary, unnecessary, and flagrant invasion of property rights clearly guaranteed by the Constitution, such an act is as much subject to judicial review, when properly brought in question before the courts, as any other class of legislation. State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

[7] Gernert v. Louisville, 155 Ky. 589, 159 S. W. 1163, 51 L.R.A.(N.S.) 363.

[8] Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23, L.R.A.1918D, 931.

[9] See infra, § 255.

[10] See infra, § 305.

[11] Re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L.R.A.(N.S.) 288, 10 Ann. Cas. 187.

[12] Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282.

[13] State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898.

[14] Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 47 So. 1001, 20 L.R.A.(N.S.) 126, 16 Ann. Cas. 1234.

[15] State ex rel. McCurdy v. Bennett, 37 N. D. 465, 163 N. W. 1063, L.R.A.1917F, 1076.

[16] Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

[17] Kenny v. McKenzie, 23 S. D. 111, 25 S. D. 485, 120 N. W. 781, 127 N. W. 597, 49 L.R.A.(N.S.) 775.

See infra, § 375.

[18] See supra, § 18.

absolute,[19] and that, therefore, it covers the whole range of legitimate legislation.[20]

[19] **United States.**—Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721.
Alabama.—Bankhead v. Sulligent, 229 Ala. 45, 155 So. 869, 96 A.L.R. 1381; White v. Decatur, 225 Ala. 646, 144 So. 873, 86 A.L.R. 914; State v. Birmingham S. R. Co. 182 Ala. 475, 62 So. 77, Ann. Cas. 1915D, 436.
Arkansas.—Adams v. Spillyards, 137 Ark. 641, 61 S. W. (2d) 686, 86 A.L.R. 1493.
California.—Ingels v. Riley, 5 Cal. (2d) 154, 53 P. (2d) 939, 103 A.L.R. 1; MacMillan Co. v. Clarke, 184 Cal. 491, 194 P. 1030, 17 A.L.R. 288.
Connecticut.—Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; State ex rel. Bulkely v. Williams, 68 Conn. 131, 35 A. 24, 421, 48 L.R.A. 465, affirmed in 170 U. S. 304, 42 L. ed. 1047, 18 S. Ct. 617.
Florida.—State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Anderson v. Ocala, 67 Fla. 204, 64 So. 775, 52 L.R.A.(N.S.) 287; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Munn v. Finger, 66 Fla. 572, 64 So. 271, 51 L.R.A.(N.S.) 631.
Idaho. — Independent School Dist. v. Pfost, 51 Idaho, 240, 4 P. (2d) 893, 84 A.L.R. 820; Re Kessler, 26 Idaho, 764, 146 P. 113, L.R.A.1915D, 322, Ann. Cas. 1917A, 228; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282.
Illinois.—Fenske Bros. v. Upholsters' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; People v. Barber, 348 Ill. 40, 180 N. E. 633, 92 A.L.R. 1131; People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Stark County v. Henry County, 326 Ill. 535, 158 N. E. 116, 54 A.L.R. 777; People v. Roth, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.
Indiana.—Bolivar Twp. Bd. of Finance v. Hawkins, 207 Ind. 171, 191 N. E. 158, 96 A.L.R. 271; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92.
Kentucky.—Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540.
Maine.—Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734; Bayville Village Corp. v. Boothbay Harbor, 110 Me. 46, 85 A. 300, Ann. Cas. 1914B, 1135.
Michigan.—Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105.
Minnesota.—Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918F, 542; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 459.
Mississippi. — State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495.
Missouri.—Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.; State ex rel. Barker v. Merchants' Exchange, 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114.
Montana.—State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329; State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; State ex rel. Public Serv. Commission v. Brannon, 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020.
Nebraska.—State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L.R.A. 624; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L.R.A. 774.
Nevada.—Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747.
New Jersey.—Atlantic Coast Electric R. Co. v. Public Utility Comrs. 92 N. J. L. 168, 104 A. 218, 12 A.L.R. 737, writ of error dismissed in 254 U. S. 660, 65 L. ed. 462, 41 S. Ct. 10.
New York.—Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L.R.A. 579; Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L.R.A. 340, 12 Am. St. Rep. 819.
North Carolina.—Jenkins v. State Bd. of Elections, 180 N. C. 169, 104 S. E. 346, 14 A.L.R. 1247; Shelby v. Cleveland Mill & Power Co. 155 N. C. 196, 71 S. W. 218, 35 L.R.A.(N.S.) 488, Ann. Cas. 1912C, 179.
North Dakota.—State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.
Pennsylvania.—Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422.
Rhode Island.—Miller v. Clarke, 47 R. I. 13, 129 A. 606, 42 A.L.R. 1204.
South Carolina.—Crawford v. Johnston, 177 S. C. 399, 181 S. E. 476, citing R. C. L.
South Dakota.—Wheelon v. South Dakota Land Settlement Bd. 43 S. D. 551, 181 N. W. 359, 14 A.L.R. 1145; State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860; Chamberlain v. Wood, 15 S. D. 216, 88 N. W. 109, 56 L.R.A. 187, 91 Am. St. Rep. 674.
Tennessee.—Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A. 1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.
Texas.—Jones v. Williams, 121 Tex. 94, 45 S. W. (2d) 130, 79 A.L.R. 983; Ex parte Allison, 99 Tex. 455, 90 S. W. 870, 2 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 653; Long v. State, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.
Utah.—Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193.
Virginia.—Miller v. Com. 88 Va. 618, 14 S. E. 161, 15 L.R.A. 441.
Washington. — Robb v. Tacoma, 175 Wash. 580, 28 P. (2d) 327, 91 A.L.R. 1010; State v. King County, 67 Wash. 37, 120 P. 861, Ann. Cas. 1913D, 78.
West Virginia.—State Road Commission v. Kanawha County Ct. 112 W. Va. 98, 163 S. E. 815, citing R. C. L.; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.
Wisconsin.—Krenz v. Nichols, 197 Wis. 394, 222 N. W. 300, 62 A.L.R. 466; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas.

The powers of the other two departments are not as extensive. The reason is based on the source of the departmental powers, and, unlike the lawmaking power, the power of the executive and judicial departments in a state government is a grant, not a limitation,[1] and those two co-ordinate departments of government can therefore exercise only the powers conferred upon them by the Constitution.[2] Nevertheless, it cannot be maintained that the legislative department is closer to the people than are the other departments or that its powers are more extended in their operation than are the powers granted to the executive or the judiciary within their confines, since each department of the government in its respective domain represents the people, and no department can encroach upon the jurisdiction and functions of the other, unless authority therefor is found in the Constitution.[3]

The legislative power has been described generally as being the power to make, alter, and repeal laws,[4] and the general rule is that if limitations upon the exercise of such functions are not found in the Constitution, they do not exist,[5] except in so far as all Constitutions may be said to be limited.[6] As a rule, therefore, and speaking generally, a legislature may do what the state[7] and Federal Constitutions do not prohibit.[8]

§ 194. —Express or Implied Constitutional Limitations.—Where a state Constitution provides that the legislative power of the commonwealth shall be vested in a general assembly, by the force of these general words, if there is nothing elsewhere to qualify them, it is held that an unlimited power is given to the legislature to make all such laws as it may think proper.[9] The broad powers inherent in the legislative body of a state may be subjected to express limitations by the provisions of a state Constitution itself,[10] as, for example, where it provides that the legislative power shall be limited by the principles of liberty and free government contained in a bill or declaration of rights[11] or where it is expressly declared that the enumeration of rights shall not be construed to impair or deny others retained by the people.[12]

The doctrine is also established that legislative authority may be limited by those restrictions which are impliedly imposed.[13] Restrictions in a Constitu-

1913C, 863; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L.R.A. 739; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L.R.A. 394.

Wyoming.—First Nat. Bank v. Foster, 9 Wyo. 157, 61 P. 466, 63 P. 1056, 54 L.R.A. 549.

The legislative power can be restrained only by constitutional provisions—not by the common or statutory law of England. State v. Lewis, 142 N. C. 626, 55 S. E. 600, 7 L.R.A.(N.S.) 669.

Under the North Dakota Constitution "all governmental power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions." State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

The Ohio constitutional provision that "the legislative power of the state shall be vested in a general assembly" confers a general, and not limited, power. Ostrander v. Preece, 129 Ohio St. 625, 196 N. E. 670, 103 A.L.R. 218, appeal dismissed in 296 U. S. 543, 80 L. ed. 386, 56 S. Ct. 151.

The Senate and General Assembly, in whom by the Constitution the legislative power is vested, must necessarily, as the representatives of all the people of the state, be held to retain all the sovereign powers, except as far as they have by unmistakable language intrusted them to others. Atlantic Coast Electric R. Co. v. Public Utility Comrs. 92 N. J. L. 168, 104 A. 218, 12 A.L.R. 737, writ of error dismissed in 254 U. S. 660, 65 L. ed. 462, 41 S. Ct. 10.

In Kansas the powers are regarded as granted to the legislature, but all power is regarded as granted that is not expressly withheld. State ex rel. Brewster v. Knapp, 99 Kan. 852, 163 P. 181, L.R.A.1917C, 1034; State v. Durein, 70 Kan. 1, 78 P. 152, 80 P. 987, 15 L.R.A.(N.S.) 908, affirmed in 208 U. S. 613, 52 L. ed. 645, 28 S. Ct. 567.

[20] Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of the other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated. Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

Where legislative power is undefined, it includes the judicial and executive attributes. Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. ed. 721.

For examples of the range of legislative authority over different subjects, see supra, § 192.

[1] State ex rel. Richardson v. Henderson, 4 Wyo. 535, 35 P. 517, 22 L.R.A. 751.

[2] Laughlin v. Portland, 111 Me. 486, 90 A. 318, 51 L.R.A.(N.S.) 1143, Ann. Cas. 1916C, 734.

[3] Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L.R.A. 93.

[4] People v. Seymour, 16 Cal. 332, 76 Am. Dec. 521; People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. ed. 206, 34 S. Ct. 92; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L.R.A. 65; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; State v. Crawford, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880; King v. Com. 194 Ky. 143, 238 S. W. 373, 22 A.L.R. 535; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A. 1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

[5] Jordan v. Evansville, 163 Ind. 512, 72 N. E. 544, 67 L.R.A. 613, 2 Ann. Cas. 96; Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.

[6] Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547; Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.

[7] Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.; Ex parte Berger, 193 Mo. 16, 90 S. W. 759, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 5 Ann. Cas. 383; Busser v. Snyder, 282 Pa. 440, 128 A. 80, 37 A.L.R. 1515; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Russ v. Com. 210 Pa. 544, 60 A. 169, 1 L.R.A.(N.S.) 409, 105 Am. St. Rep. 825; Re State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

"The only restraints upon the exercise of the legislative prerogative are those expressly or impliedly contained in the Federal and state Constitutions, and those immutable principles which lie at the very foundation of society." Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102.

For the similar rule as to the extent of subjects the authority of the legislature may cover, see supra, § 192.

[8] Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. ed. 568; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334; Harder's Fireproof Storage & V. Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann Cas. 536; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Todd v. Reynolds (Mo.) 199 S. W. 173, citing R. C. L.; State ex rel. Richardson v. Henderson, 4 Wyo. 535, 35 P. 517, 22 L.R.A. 751.

[9] Opinions of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

[10] Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; State ex rel. Barker v. Merchants' Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Kalich v. Knapp, 73 Or. 558, 142 P. 594, 145 P. 22, Ann. Cas. 1916E, 1051; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

"The people are the masters of their legislature and . . . in a matter involving exclusively state functions they may say in their organic law what the legislature may enact and what they may not enact; and a denial to a legislature of such a right, or what otherwise might be such a right, to pass certain laws, cannot be made the basis of a valid claim that such denial is a violation of any right which the people of the state may have under the Federal Constitution." Hockett v. State Liquor Licensing Bd. 91 Ohio St. 176, 110 N. E. 485, L.R.A.1917B, 7.

[11] Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030, Ann. Cas. 1913B, 946; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

The general declaration in the Wisconsin Constitution, Art. 1, § 1, that governments are instituted to secure the inherent rights of life, liberty, and the pursuit of happiness, is a limitation upon legislative power, designed in part at least to prevent clearly unreasonable enactments restricting natural private rights. State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

[12] McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410, overruled on another point in State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

[13] State v. Martin, 60 Ark. 343, 30 S. W. 421, 28 L.R.A. 153; Re Kindergarten Schools, 18 Colo. 234, 32 P. 422, 19 L.R.A. 469; McDonald v. Doust, 11 Idaho, 14, 81 P. 60, 69 L.R.A. 220; Gemmer v. State, 163 Ind. 150, 71 N. E. 478, 66 L.R.A. 82; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Lexing-

tion as to legislation are equally effective whether they arise by implication or are stated in express terms;[14] and such restrictions may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law.[15] In still another though less definite sense a limitation upon legislative authority may be said to be imposed by the fundamental nature and the deeper purposes of our system of government. In this connection Chief Justice Marshall has said that "it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power."[16] Accordingly, it has been said that laws may be declared invalid although not repugnant to any expressed restriction contained in a state Constitution.[17]

The curtailment of legislative power by implied limitations is only existent in cases where it is clear that a construction of the constitutional provisions involved requires such restrictions. Restraints upon legislative powers are not to be lightly inferred.[18]

§ 195. —Limitations as to Criminal or Penal Legislation.—In harmony with the power of the legislature to alter or modify the common law[19] and to define criminal offenses and fix the penalty therefor,[20] it is recognized that the legislature may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy.[1] The power of the general legislature acting within constitutional limitations to make penal an act theretofore indifferent or even innocent is not doubted,[2] for in the absence of constitutional inhibition, the legislature may make any act a crime, regardless of whether or not moral turpitude is involved in such act.[3]

The distinction must be recognized that the legislature has no power to pronounce the performance of an innocent act criminal where the public health, safety, comfort, or welfare is not interfered with[4] or where the exercise of the police power is not involved.[5] It has also been held that a statute declaring that to be a crime which consists alone in the exercise of a constitutional right, as that of terminating a contract, is unconstitutional and void.[6]

§ 196. —Power to Modify Common Law.—It is said that a person has no property or vested interest in any rule of the common law,[7] and the powers of the legislature are in no manner limited or restricted by the common law of a particular state.[8] A state undoubtedly has the constitutional and legislative power to change or modify the common law,[9] for the Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law to attain a permissible legislative object.[10] Moreover, the mere grant of legislative power in a Constitution implies the right to change the common law. For example, changes may be made with reference to administrative and remedial processes,[11] and a state may change the com-

ton v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361; State, Paul, Prosecutor, v. Judge of Circuit Ct. 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410; Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449; Crabb v. Celeste Independent School Dist. 105 Tex. 194, 146 S. W. 528, 39 L.R.A.(N.S.) 601, Ann. Cas. 1915B, 1146; State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L.R.A. 847; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

[14] State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; Gautier v. Ditmar, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913C, 960; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L.R.A. 408; Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449.

[15] State ex rel. Geake v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L.R.A. 893; Board of Elections v. State, 128 Ohio St. 273, 191 N. E. 115, 97 A.L.R. 1417; Ex parte Lewis, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

All grants of power are to be interpreted in the light of the maxims of the Magna Charta and the common law as transmitted into the Bill of Rights; and those things which these maxims forbid cannot be regarded as within any grant of authority made by the people to their agent, the legislature. White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

Legislative enactments violative of the general principle that persons must not be deprived of life, liberty, or the pursuit of happiness are void, as beyond the powers of the state legislature, by reason of the Declaration of Independence and the Declaration of Rights, as well as the Federal Constitution. State ex rel. Kellogg v. Currans, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

[16] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

As to certain rights which are clearly beyond the control of the state legislature, see Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274.

[17] Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477, 57 L.R.A. 775, 101 Am. St. Rep. 361; State Bank v. Cooper, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

See also supra, § 135.

[18] Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244.

[19] See infra, § 196.

[20] See supra, § 192.

[1] Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Rhodes v. Sperry & H. Co. 193 N. Y. 223, 85 N. E. 1097, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945; Berthoef v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

[2] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Ex parte Lorenzen, 128 Cal. 431, 61 P. 68, 50 L.R.A. 55, 79 Am. St. Rep. 47; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Ex parte Berger, 193 Mo. 16, 90 S. W. 759, 3 L.R.A.(N.S.) 530, 112 Am. St. Rep. 472, 5 Ann. Cas. 383; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Rhodes v. Sperry & H. Co. 193 N. Y. 223, 85 N. E. 1097, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945; State v. Thompson, 47 Or. 492, 84 P. 476, 4 L.R.A.(N.S.) 480, 8 Ann. Cas. 646.

[3] State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Odenthal v. State, 106 Tex. Crim. Rep. 1, 290 S. W. 743, citing R. C. L.; Sherow v. State, 105 Tex. Crim. Rep. 650, 290 S. W. 754, citing R. C. L.

Making it a crime to advocate malicious injury to property of an employer as a means of accomplishing political or industrial ends is not an abridgment of the privileges and immunities of citizenship. State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331.

[4] Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L.R.A. 134, 16 Am. St. Rep. 813; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452.

[5] Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, 68 N. E. 938, 98 Am. St. Rep. 254.

[6] Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443.

See infra, § 346.

[7] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A. (N.S.) 44; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998.

[8] People v. Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277; State v. Lewis, 142 N. C. 626, 55 S. E. 600, 7 L.R.A.(N.S.) 669, 9 Ann. Cas. 604.

[9] Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Louis Pizitz Dry Goods Co. v. Yeldell, 274 U. S. 112, 71 L. ed. 952, 47 S. Ct. 509, 51 A.L.R. 1376; Fall River Valley Irrig. Dist. v. Mt. Shasta P. Corp. 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Greenberg v. Western Turf Asso. 148 Cal. 126, 82 P. 684, 113 Am. St. Rep. 216; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126; Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998.

For discussion of principles relating to modification of common-law rules, see COMMON LAW, ante, p. 168, § 15.

[10] Silver v. Silver, 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939.

[11] McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268.

Statutory actions and remedies in some instances may be substituted for previously existing common-law remedies without any impairment of vested rights. Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451.

"The power of the legislature to change rules of evidence as they existed at the

mon law so as to create duties and liabilities which never existed before.[11] Hence, it is not a valid objection to a statute that it creates a right of action and imposes a liability unknown to the common law.[13]

While rights of property which have been created by the common law cannot be taken away without due process, the law itself, as a rule of conduct, may be changed at the will of the legislature, unless prevented by constitutional limitations. It has been said that the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances.[14] Thus, the legislature may alter, change, or annul the old common-law rules of conveyancing.[15]

§ 197. Executive Encroachment upon, or Interference with, Legislature.—It is clear that the executive department can neither encroach upon the functions of the legislature nor interfere in its duties. The executive cannot discharge the functions of the legislature in any manner by so acting in his official capacity that his conduct is tantamount to a repeal of legislation. Consequently, the governor of a state cannot undertake any indirect repeals by the power of pardon, commutation, or parole merely because he does not believe in the policy of the law enacted by the lawmaking body or because the legislature is hostile to his views.[16]

§ 198. Judicial Encroachment upon Legislature.—A fundamental principle scrupulously observed by the courts is to the effect that the judiciary may not encroach upon the functions of the legislature. The most common occurrence of the refusal of the courts to stray outside the proper confines of judicial activity arises in cases dealing with the provisions of statutes. Since the power to make, alter, or repeal laws is legislative,[17] the courts will not encroach upon the domain of a co-ordinate department of the government by judicial enlargement, abridgment, alteration, or repeal of legislative enactments.[18] The remedy for the failure of a statute to cover every possible

common law and to limit, change, and vary existing rules for the limitations of actions has been the subject of frequent consideration in the courts and has been uniformly upheld." People ex rel. Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102, 4 A.L.R. 463.

The legislature may make the choses in action of a corporation subject to execution. Smith v. United States F. Ins. Co. (Smith v. Johns) 126 Tenn. 435, 150 S. W. 97, 45 L.R.A.(N.S.) 266, Ann. Cas. 1913E, 196.

[12] Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156.

Common-law rules governing the use of property may be changed, and a cause of action prescribed where none existed before, without any impairment of vested rights. Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451.

[13] Rhodes v. Sperry & H. Co. 193 N. Y. 223, 85 N. E. 1097, 34 L.R.A.(N.S.) 1143, 127 Am. St. Rep. 945, affirmed in 220 U. S. 502, 55 L. ed. 561, 31 S. Ct. 490; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

[14] Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

[15] Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A.L.R. 992.

[16] Henry v. State, 10 Okla. Crim. Rep. 369, 136 P. 982, 52 L.R.A.(N.S.) 113.

[17] See supra, § 193.

[18] Ebert v. Poston, 266 U. S. 548, 69 L. ed. 435, 45 S. Ct. 188; Ex parte Speer, 53 Idaho, 293, 23 P. (2d) 239, 88 A.L.R. 1086; Smith v. Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487, L.R.A.1916E, 593; Com. v. Hazel, 155 Ky. 30, 159 N. E. 673, 47 L.R.A. (N.S.) 1078; Eden v. Pineo, 108 Me. 73, 78 A. 1126, Ann. Cas. 1913A, 1340; Michigan Teleph. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L.R.A. 87, 80 Am. St. Rep. 520; Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450; State ex rel. Seeligman v. Hays, 50 Mo. 34, 11 Am. Rep. 402; Powell v. Strickland, 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709; Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 18 Ann. Cas. 1006; O'Hagan v. Fraternal Aid Union, 144 S. C. 84, 141 S. E. 397, 57 A.L.R. 397; Triplett v. Columbia, 111 S. C. 7, 96 S. E. 675, 1 A.L.R. 349; Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Hadfield

situation which may arise is for the legislature, and not for the courts.[19] In a similar manner the uncontroverted doctrine that the courts will not consider the justice, wisdom, expediency, necessity, or policy of legislation[20] has its basis in the circumspect avoidance by the judiciary of encroachment upon the functions of a coequal branch of the government.[1]

§ 199. —Legislative Discretion as to Means Ordinarily Binding on Courts.—The courts avoid encroachment upon the legislature in its exercise of departmental discretion in the means used to accomplish legitimate legislative ends. Since the legislature is given a large discretion in reference to the means it may employ to promote the general welfare,[2] and alone may judge what means are necessary and appropriate to accomplish an end which the Constitution makes legitimate,[3] the courts cannot undertake to decide whether the means adopted by the legislature are the only means or even the best means possible to attain the end sought, for such course would vest the exercise of the police power of the state in the judicial department. It has been said that the methods, regulations, and restrictions to be imposed to attain results consistent with the public welfare are purely of legislative cognizance, and the determination of the legislature is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.[4] Fur-

v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A. 1918B, 909, Ann. Cas. 1918C, 942.

[19] Nippon-Ki-Ito Kaisha v. Ewing-Thomas Corp. 313 Pa. 442, 170 A. 286, 93 A.L.R. 1067.

[20] See supra, §§ 137 et seq.

[1] Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Fergus v. Marks, 321 Ill. 510, 152 N. E. 557, 46 A.L.R. 960; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033, L.R.A.1916E, 380, Ann. Cas. 1916B, 1149, affirmed in 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157; St. Louis S. W. R. Co. v. State, 113 Tex. 570, 261 S. W. 996, 33 A.L.R. 367; Malette v. Spokane, 77 Wash. 205, 137 P. 496, 51 L.R.A.(N.S.) 686, Ann. Cas. 1915D, 225.

[2] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Clendaniel v. Conrad, 3 Boyce (Del.) 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203; State ex rel. Clarkson v. Phillips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 70 A.L.R. 166; State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955 (concurring opinion).

For a general discussion of the legislative discretion as to means in employing the police power of the state, see infra, § 305.

[3] People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146; Arnett v. State, 168 Ind. 180, 80 N. E. 153, 8 L.R.A.(N.S.) 1192; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L.R.A. 748, 83 Am. St. Rep. 187; Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 174, 46 N. E. 77, 37 L.R.A. 189; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L.R.A. 576, 16 Am. St. Rep. 396; Russell v. County Bd. of Edu. 247 Ky. 703, 57 S. W. (2d) 681, citing R. C. L.; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955 (concurring opinion); Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.

[4] St. Louis S. W. R. Co. v. Miller Levee Dist. (C. C. A. 8th) 207 F. 338, L.R.A.1916F, 1181; Allied Architects' Asso. v. Payne, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; State ex rel. Anderson v. Brand, — Ind. —, 5 N. E. (2d) 531, 913, 7 N. E. (2d) 777, 110 A.L.R. 778; Bolden v. Grand Rapids Operating Corp. 239 Mich. 318, 214 N. W. 241, 53 A.L.R. 183; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.

thermore, in the absence of a clear violation of a constitutional inhibition, the courts should assume that legislative discretion has been properly exercised.[4]

§ 200. Judicial Interference with Legislature.—The principle is well established that the courts will not assume a jurisdiction in any case which will amount to an interference by the judicial department with the legislature since each department is equally independent within the powers conferred upon it by the Constitution.[6] For this reason the courts are without power either to convene the legislature or to reconvene it after it has adjourned.[7] The judiciary, furthermore, cannot interfere with the legislative process of enacting the laws. During the process of legislation in any mode, the work of the lawmakers is not subject to judicial arrest or control or open to judicial inquiry.[8] Hence, it is not within the power of the judiciary to enjoin the legislature from passing a proposed statute or compel it by mandamus to do so.[9] The courts cannot compel the legislature, a co-ordinate department, to perform certain legislative duties which the Constitution of the state requires, such as the enactment of legislation making an apportionment of election districts.[10] Moreover, the courts will not mandamus the speaker of the House of Representatives to send a bill to the Senate which is alleged to have passed the House, where he has refused to send the bill to the Senate because he and the House, on appeal from his decision, have erroneously construed a constitutional provision requiring a "vote of two thirds of each house" to pass a bill.[11]

The general rule has been applied in other cases to cause the courts to refuse to intervene in what are exclusively legislative functions. Thus, where the state Senate is given the power to expel a member, the courts will not review its action or revise even a most arbitrary or unfair decision.[12] Similarly, where the state Constitution provides that contested elections for governor and lieutenant governor shall be determined by the General Assembly, its determination of the result is conclusive, and its decision is not open to judicial review.[13]

On the other hand, no usurpation by the court of legislative powers or invasion of the functions of the legislature is involved in compelling officers of the legislature to perform the duty imposed by the state Constitution of signing enacted bills, into which duty the element of discretion does not enter.[14] Similarly, where an alleged illegal ministerial official act merely has a relation to legislative action, such action may be considered by the courts in determining the validity or invalidity of the ministerial act. This is not

(N.S.) 494, Ann. Cas. 1912B, 1030; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; Winston v. Moore, 244 Pa. 447, 91 A. 520, L.R.A.1915A, 1190, Ann. Cas. 1915C, 498; Mumme v. Marrs, 120 Tex. 383, 40 S. W. (2d) 31, citing R. C. L.; Moore v. Moore, 147 Va. 460, 137 S. E. 488, 51 A.L.R. 1517.

5 Moore v. Moore, 147 Va. 460, 137 S. E. 488, 51 A.L.R. 1517.

6 Schieffelin v. Komfort, 212 N. Y. 520, 106 N. E. 675, L.R.A.1915D, 485.

7 French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann. Cas. 756.

8 Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601.

9 State ex rel. Abel v. Gates, 190 Mo. 540, 89 N. W. 881, 2 L.R.A.(N.S.) 152.

10 Fergus v. Marks, 321 Ill. 510, 152 N. E. 557, 46 A.L.R. 960.
Annotation: 46 A.L.R. 964.
See also MANDAMUS [Also 18 R. C. L. p. 186, § 109].

11 Ex parte Echols, 39 Ala. 698, 88 Am. Dec. 749.

12 French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann. Cas. 756.

13 Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 S. Ct. 890, 1009.

14 Kavanaugh v. Chandler, 255 Ky. 182, 72 S. W. (2d) 1003, 95 A.L.R. 273.

an interference by the courts with the legislative department of the government.[15]

d. Judiciary as Separate Department

§ 201. Generally.[16]—The power to maintain a judicial department is an incident to the sovereignty of each state.[17] Under the doctrine of the separation of the powers of government[18] judicial power, as distinguished from executive and legislative power, is vested in the courts as a separate magistracy.[19]

The judiciary is an independent department of the state and of the Federal government, deriving none of its judicial power from either of the other departments. This is true although the legislature may create courts under the provisions of the Constitution. When created, the judicial power is conferred by the Constitution, and not by the act creating the court.[20] It was said at an early period in American law that the judicial power in every well-organized government ought to be coextensive with the legislative power so far, at least, as private rights are to be enforced by judicial proceedings.[1] The rule is now well settled that under the various state governments, the Constitution confers on the judicial department all the authority necessary to exercise powers as a co-ordinate department of the government.[2] Moreover, the independence of the judiciary is the means provided for maintaining the supremacy of the Constitution.[3]

In a general way the courts possess the entire body of judicial power. The other departments cannot, as a general rule, properly assume to exercise any part of this power.[4] Nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches.[5] A Constitution which expressly provides that the legislature shall not deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government is intended simply to preserve to the judicial department the right and power finally to determine controversies between parties involving their rights and on whose claims some decision or judgment must be rendered.[6]

It is a general rule that judicial offices must be exercised in person and that a judge cannot delegate his authority to another.[7]

15 Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

16 For detailed discussion of the powers of the judiciary as a separate department of the government, see COURTS [Also 7 R. C. L. p. 1029, §§ 57 et seq.].

17 Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352, 73 A. 754, 17 Ann. Cas. 324.

18 See supra, § 180.

19 Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507; Norwalk Street R. Co's Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Burnett v. Green, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; Ex parte Earman, 85 Fla. 297, 95 So. 755, 31 A.L.R. 1226; State v. Shumaker, 200 Ind. 623, 157 N. E. 769, 162 N. E. 441, 163 N. E. 272, 58 A.L.R. 954; State v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770.

20 Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Norwalk Street R. Co's Appeal, 69 Conn. 576, 37 A. 1080, 38 A. 708, 39 L.R.A. 794; Parker v. State, 135 Ind. 534, 35 N. E. 179, 23 L.R.A. 859; Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

1 Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181.

2 Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1509.

3 Riley v. Carter, 165 Okla. 262, 25 P. (2d) 666, 88 A.L.R. 1018.

4 State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105.

5 Vidal v. Backs, 218 Cal. 99, 21 P. (2d) 952, 86 A.L.R. 1134; Shaw v. Moore, 104 Vt. 529, 162 A. 373, 86 A.L.R. 1139.

6 McKnight v. Grant, 13 Idaho, 629, 92 P. 989, 121 Am. St. Rep. 287.

7 Reybold v. Dodd, 1 Harr. (Del.) 401, 26 Am. Dec. 401; State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; Morrow v. Corbin, 122 Tex. 553, 62 S. W. (2d) 641, citing R. C. L.

Express provisions in the state Constitutions often modify the general doctrine of separation of powers as applied to the judicial department. Thus, it is clear that certain powers which are essentially nonjudicial in character and not ordinarily to be used by the courts may be expressly intrusted to them by the Constitution.[8] In some states the state Constitution itself, although providing for a separation of the three departments of the government, allows the courts to exercise powers other than those expressly conferred upon them by the Constitution, due to additional provisos which have the effect of expressly modifying the mandate of the Constitution that no one department shall exercise functions appertaining to the others. Such Constitutions provide for the exercise by the courts of express powers which ordinarily and otherwise would belong to another branch of the government.[9] On the other hand, in some states the converse is true, and the state Constitution expressly provides for the exercise of actual judicial powers and functions by nonjudicial officers. Thus, a statute creating a board of commissioners of the state bar and conferring upon them, inter alia, the power to suspend or disbar attorneys subject to the court's power of review is within the constitutional powers of the legislature in view of an affirmative provision of the Constitution that powers of a judicial nature may be invested in such persons as the legislature may designate.[10]

§ 202. Scope of Judicial Functions.—As a rule no effort is made in a Constitution accurately to define the scope or nature of judicial powers. These matters are left to be determined in the light of the common law and the history of our institutions as they existed anterior to, and at the adoption of, the Constitution.[11] It has been stated that the term "judicial power" is not capable of a precise definition.[12] Various tests have, however, been suggested for determining what are or what are not judicial powers.[13] It has been said that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial.[14] Thus, where the facts out of which a moral or legal obligation

[8] Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

[9] Gay v. District Ct. 41 Nev. 330, 171 P. 156, 173 P. 885, 3 A.L.R. 224.

[10] Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671.

[11] State v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; Decamp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

Judicial power in matters of law and equity is, under a constitutional provision vesting it in courts, such power as the courts, under the English and American systems of jurisprudence, had always exercised in actions at law and in equity. State ex rel. Ellis v. Thorne, 112 Wis. 81, 87 N. W. 797, 55 L.R.A. 956.

[12] People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Rohde v. Newport, 246 Ky. 476, 55 S. W. (2d) 368, 87 A.L.R. 701; Goetz v. Black, 256 Mich. 564, 240 N. W. 94, 84 A.L.R. 802; American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694.

Annotation: Ann. Cas. 1913E, 1098.

The power to ascertain and decide is not necessarily a judicial power and is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756.

[13] State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089.

[14] State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089.

Annotation: Ann. Cas. 1913E, 1097.

"Judicial power" is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws, and this power involves, not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such pro-

is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by the Constitutions of the states.[15]

It is clear that a proceeding is not necessarily nonjudicial because it is not adversary nor because there is not an appearance or active opposition by some defendant,[16] and it is not necessary that the adjudication between the parties shall be conclusive of their rights put in issue.[17] Judicial power is not restricted to determining controversies actually existing, but may be extended to controversies anticipated, so as to include the functions of providing security against disputes and claims which may arise, of protecting property and rights from possible, though at the time unknown, hostile claims and pretensions, and of declaring a status or right, thereby forestalling and preventing controversies.[18]

§ 203. Illustrations of Judicial Functions.—Under the American system of constitutional government, among the most important functions intrusted to the judiciary are the interpreting of Constitutions[19] and, as a closely connected power, the determination of whether laws and acts of the legislature are or are not contrary to the provisions of the Federal and state Constitutions.[20] This power of deciding on the constitutionality of statutes is very broad and includes even the right to decide whether an apportionment act dividing the state into political election districts is in accordance with the constitutional requirements.[1] It has even been held in one jurisdiction that where there are two conflicting legislatures, each claiming the right to exercise legislative functions, it is for the courts to determine which has the lawful authority.[2]

The judicial powers include the important function of preventing departmental encroachment, such as marking out the boundaries of each department

ceedings, and the power to hear without the power to adjudicate and determine the rights of the parties is not judicial power, as that term is used in the Constitution. People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Devine v. Brunswick-Balke-Collender Co. 270 Ill. 504, 110 N. E. 780, Ann. Cas. 1917B, 887; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; People ex rel. Kern v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L.R.A. 105.

Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between parties who institute a suit before it according to the regular course of judicial procedure. Muskrat v. United States, 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250; Goetz v. Black, 256 Mich. 564, 240 N. W. 94, 84 A.L.R. 802.

A court is a governmental body for the public administration of justice, not for the determination of the wisdom of a public measure designed to promote public health, convenience, or welfare. Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244.

For detailed discussion, see COURTS [Also 7 R. C. L. p. 1047, § 81].

[15] Harris v. Alleghany County, 130 Md. 488, 100 A. 733, L.R.A.1917E. 824.

[16] Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

[17] People ex rel. Kern v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L.R.A. 105.

[18] Robinson v. Kerrigan, 151 Cal. 40, 90 P. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334.

The general subject of declaratory judgments is discussed in DECLARATORY JUDGMENTS.

[19] Webster v. Cooper, 14 How. (U. S.) 488, 14 L. ed. 510; Hamilton Bank v. Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L.R.A. 369, 31 Am. St. Rep. 284; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N. E. 465, 50 A.L.R. 1518; State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N. E. 252, 4 L.R.A. 79; State ex rel. Standard Oil Co. v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089.

[20] Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L.R.A. 567; Pitman v. Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D, 601; State ex rel. Richards v. Whisman, 36 S. D. 260, 154 N. W. 707, L.R.A.1917B, 1, writ of error dismissed in 241 U. S. 643, 60 L. ed. 1218, 36 S. Ct. 449; Peay v. Nolan, 157 Tenn. 222, 7 S. W. (2d) 815, 60 A.L.R. 408.

The questions as to whether the legislature has abridged some fundamental right of a citizen and whether it has assumed its prerogative over subjects not within its province are judicial questions. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386.

As to the power of the courts to declare laws unconstitutional, see supra, § 86.

[1] Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242; Giddings v. Blacker, 93 Mich. 1, 52 N. W. 944, 16 L.R.A. 402.

[2] Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325.

and remedying the invasions by either of the territory of the other.[3] When called on to review and control the acts of an officer of a co-ordinate branch of the government, however, the courts should proceed with extreme caution, and the right to exercise the power should be manifestly clear.[4] The whole subject as to the power of the judiciary to construe Constitutions and thus to determine the constitutionality of acts of the other two departments of government has been accorded detailed consideration elsewhere.[5]

The judicial power generally extends to the determination of controversies of many different types and kinds. Under the Federal Constitution power is given to adjudicate questions which ordinarily might be treated as political in character, such as the location of boundaries between states.[6] Similarly, the judicial power and function extend to the question as to the true limits of maritime law and admiralty jurisdiction,[7] the imposition of the penalty in a criminal case by sentence,[8] the determination of what is a reasonable freight rate,[9] the authority to select persons whose services may be required in judicial proceedings or who may be required to act as assistants to the judges in the performance of their judicial functions,[10] the authority to determine whether or not a plaintiff has produced evidence which is sufficient in law to sustain a judgment in his favor,[11] and the power to remove district attorneys from office.[12]

§ 204. Distinction between Judicial and Executive or Legislative Powers.—The distinction between legislative or ministerial functions and judicial functions is difficult to point out. What is a judicial function does not depend solely on the mental operation by which it is performed or the importance of the act. In solving this question, due regard must be had to the organic law of the state and the division of powers of government. In the discharge of executive and legislative duties, the exercise of discretion and judgment of the highest order is necessary, and matters of the greatest weight and importance are dealt with. It is not enough to make a function judicial that it requires discretion, deliberation, thought, and judgment.[13] To be judicial, the exercise of discretion and judgment must be within that subdivision of the sovereign power which belongs to the judiciary or, at least, which does not belong to the legislative or executive department. If the matter, in respect to which it is exercised, belongs to either of the two last-named departments of government, it is not judicial. What is judicial and what is not in such cases seem to be better indicated by the nature of a thing than its definition.[14]

[3] State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[4] Jobe v. Urquhart, 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351.

[5] See supra, §§ 86 et seq.

[6] Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

[7] The Lottawanna (Rodd v. Heartt) 21 Wall. (U. S.) 558, 22 L. ed. 654.

[8] Miner v. United States (C. C. A. 3d) 244 F. 422, 3 A.L.R. 995.

[9] State ex rel. Godard v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662, qualified in State ex rel. Court of Industrial Relations v. Howat, 107 Kan. 423, 191 P. 585 (which has writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277), citing R. C. L.

[10] State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143.

[11] Thoe v. Chicago, M. & St. P. R. Co. 181 Wis. 456, 195 N. W. 407, 29 A.L.R. 1280. Annotation: 29 A.L.R. 1287.

[12] Atty. Gen. v. Tufts, 239 Mass. 458, 131 N. E. 573, 132 N. E. 322, 17 A.L.R. 274.

[13] Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L.R.A.(N.S.) 321.

[14] Solvuca v. Ryan & R. Co. 131 Md. 265, 101 A. 710, citing R. C. L.; Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L.R.A.(N.S.) 321.

The selection of a site on which a public necessity or public work of any sort shall be located is essentially a legislative, and not a judicial, matter, but whether a public work or utility is prosecuted according to law is a judicial question. Gibson v. Baton Rouge, 161 La. 637, 109 So. 339, 47 A.L.R. 1151.

The duties of a state board of railway commissioners relative to granting permission to discontinue operation of certain

Broadly speaking, a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist.[15] Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[16] Thus, the power to grant a moratorium because of critical conditions is a legislative, and not a judicial, power.[17]

It has been said that the fact that a power is conferred by statute on a court of justice, to be exercised by it in the first instance in a proceeding instituted therein, is, itself, of controlling importance as fixing the judicial character of the power and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or the executive department.[18] Every doubt will be resolved in favor of a statute conferring powers of an ambiguous character upon a judicial officer, in order that the powers so conferred may be held to be judicial.[19]

§ 205. Executive Encroachment upon, or Interference with, Judiciary.—Executive officers cannot usurp judicial functions, such as passing upon the constitutionality of legislation,[20] nor can they prevent the courts from exercising such functions.[1]

trains are legislative. Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 221, 152 N. W. 513, Ann. Cas. 1917B, 1205.

[15] Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496 (per Field, J.); Rosenbaum v. Stone, 131 Ark. 251, 199 S. W. 388, L.R.A.1918B, 1109; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Nega v. Chicago R. Co. 317 Ill. 482, 148 N. E. 250, 39 A.L.R. 1057; Local Union, N. B. O. P. v. Kokomo, — Ind. —, 5 N. E. (2d) 624, 108 A.L.R. 1111; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; White Bros. & C. Co. v. Watson, 64 Wash. 666, 117 P. 497, 44 L.R.A.(N.S.) 254.

A statute purporting to authorize a judge, on application, to order a judicial inquiry if, in his opinion, "the interests of public justice" require it, to ascertain whether a candidate for the United States Senate has expended more than the authorized amount to secure his election, and to certify his opinion and determination and the evidence adduced before him on such investigation to the governor, to be transmitted to the proper authorities of the United States Government for such action as they deem proper, violates a distributive constitutional provision, for it is an attempt to empower a member of the judiciary, as such, to exercise a volition to determine when, to what extent, or whether a judicial inquiry into alleged corrupt practices shall be undertaken by him on such application. Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

[16] Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496 (per Field, J.); Wulzen v. San Francisco, 101 Cal. 15, 35 P. 353, 40 Am. St. Rep. 17; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Re Speer, 53 Idaho, 293, 23 P. (2d) 239, 88 A.L.R. 1086; State v. Ramirez, 34 Idaho, 623, 203 P. 279, 29 A.L.R. 297; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Nega v. Chicago R. Co. 317 Ill. 482, 148 N. E. 250, 39 A.L.R. 1057; Local Union, N. B. O. P. v. Kokomo, — Ind. —, 5 N. E. (2d) 624, 108 A.L.R. 1111; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State v. Revis, 193 N. C. 192, 136 S. E. 346, 50 A.L.R. 98; Re Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 221, 152 N. W. 513, Ann. Cas. 1917B, 1205; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy, the former by the pleadings and evidence in a case (per McLean, J.). Pennsylvania v. Wheeling & B. Bridge Co. 18 How. (U. S.) 421, 15 L. ed. 435.

The established fellow servant doctrine cannot be done away with by the courts, but the legislature must act if any change is to be made. Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85, 56 L. ed. 679, 32 S. Ct. 402.

[17] Peterson v. Kansas City L. Ins. Co. 339 Mo. 700, 98 S. W. (2d) 770, 108 A.L.R. 583.

[18] Zanesville v. Zanesville Teleg. & Teleph. Co. 64 Ohio St. 67, 59 N. E. 781, 52 L.R.A. 150, 83 Am. St. Rep. 725.

[19] State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

[20] Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

As to the sole power of the courts to ul-

A court may enforce the execution of its judgment for contempt, notwithstanding an attempted pardon by the governor.[2]

Many acts either omitted or committed by executive officers do not constitute encroachment upon judicial power. The refusal of the attorney general to bring a suit to set aside the sale, under a power, of properties held by the trustees of a charitable trust for the entire public is not a usurpation of judicial power by an executive officer, nor does he infringe such power by challenging the right of an unsuccessful bidder for the property to maintain the suit, when he is brought by such bidder into court as an unwilling party, in response to process issued at the bidder's instance.[3] Moreover, commissioners to assist a court do not usurp judicial functions or exercise any judicial power by taking such transcripts and briefs as the court shall assign to them and reporting the result of their examination thereof, with opinions and suggestions merely for the consideration of the court as to the proper disposition of the cases.[4]

§ 206. Legislative Interference with Judiciary.—The legislature cannot ordinarily diminish, enlarge, or interfere with the jurisdiction of a court as defined by the Constitution.[5] It may, however, create courts not mentioned in the Constitution, but it may not confer upon them powers which could not have been conferred upon the courts already existing.[6]

The rule is well settled that the judicial power cannot be taken away by legislative action.[7] Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.[8] The legislature is therefore not permitted to interfere with the courts in the performance of their duties, as, for example, by declaring the forfeiture of the salary of a judge for a failure to perform his duties.[9] It has no power to direct the judiciary in the

timately determine the validity of legislation, see supra, § 87.

1 Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675.

2 State v. Shumaker, 200 Ind. 716, 164 N. E. 408, 63 A.L.R. 218.

3 Dickey v. Volker, 321 Mo. 235, 11 S. W. (2d) 278, 62 A.L.R. 858.

4 People ex rel. Morgan v. Hayne, 83 Cal. 111, 23 P. 1, 7 L.R.A. 348, 17 Am. St. Rep. 211.

5 Brown v. Allbright, 110 Ark. 394, 161 S. W. 1036, Ann. Cas. 1915D, 692; Thompson v. Redington, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161.

"It is clear from this provision of the Constitution that, in so far as judicial powers are concerned, the court of appeals obtains all its jurisdiction, both original and appellate, directly from the Constitution itself. The General Assembly has no power to extend or limit its jurisdiction, but is limited solely to the power to provide by law for the exercise by that court of the jurisdiction conferred upon it by the Constitution." Thompson v. Redington, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161.

See COURTS [Also 7 R. C. L. p. 1030, § 58].

6 Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

An act creating a court of industrial relations is not void under the Constitution of Kansas because it commingles functions of separate departments of government or because it attempts to enlarge the original jurisdiction of this court. State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 P. 686, 25 A.L.R. 1210, writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

7 State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704; Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L.R.A. 254, 60 Am. St. Rep. 691; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A. (N.S.) 781; Aucutt v. Aucutt, 122 Tex. 518, 62 S. W. (2d) 77, 89 A.L.R. 1198.

A law which provides that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge without any hearing or determination of whether the affidavit is true or false is unconstitutional, as depriving the court of judicial power and vesting the same in the litigants to that extent. Diehl v. Crump, 72 Okla. 108, 179 P. 4, 5 A.L.R. 1272. Annotation: 5 A.L.R. 1275.

8 People ex rel. Burby v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L.R.A. 838.

9 Ex parte Tully, 4 Ark. 220, 38 Am. Dec. 33.

It is the duty of the court to protect the rights of individuals against legislative investigation by refusing to permit the legislature thus to invade the jurisdiction of the court. Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334.

Judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A. 1917A, 421, Ann. Cas. 1917B, 455.

interpretation of existing statutes.[10] It cannot by statute interfere with the power vested in the courts by the state Constitution to issue writs of mandamus to enforce the performance of an official duty.[11] Similarly, a statute forbidding the courts to direct a verdict is unconstitutional as invalidly attempting to limit the constitutional powers vested in the judiciary.[12]

The general rule is subject to some modification. The fact that courts have all the inherent and implied powers necessary to function properly and effectively does not mean that they are wholly independent of the legislature, which may put reasonable restrictions upon constitutional functions of the courts, provided that such restrictions do not defeat or materially impair the exercise of those functions.[13] Thus, the legislature may, within proper bounds, prescribe rules of practice and procedure for the exercise of jurisdiction.[14] Moreover, the suspension of a possessory remedy is not an impairment of the constitutional jurisdiction of a court.[15]

Legislative interference with the courts by attempting to delegate to them legislative powers or confer upon them nonjudicial functions is elsewhere considered.[16]

§ 207. Conferring of Judicial Functions upon Executive Officers by Legislature.—The fundamental principle as to the separation of the powers of government [17] has been applied apparently with greater strictness in reference to the conferring of judicial powers upon nonjudicial officers than in analogous cases relating to the delegation of legislative power to officials not belonging to the legislative department of government.[18] Although there is nothing in the Federal Constitution which directly or impliedly forbids or prohibits a state under its own laws to confer judicial functions upon nonjudicial bodies,[19] it is the general rule that the legislature is powerless to confer judicial duties on nonjudicial officers where the state Constitution divides the powers of government into distinct departments.[20] This rule may be due in part to the operation of other constitutional provisions which in effect assert that the judicial power shall be vested exclusively in the courts.[1] While executive officers may, consistently with the distributive constitutional provision, be vested with such judicial power as may be needed to enable them to perform their executive duties, they may not be invested with such power merely because it is thought that efficiency and convenience in the administration of a statute will be promoted thereby.[2]

Generally, when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto.[3] To constitute a

10 State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

11 State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704.

12 Thoe v. Chicago, M. & St. P. R. Co. 181 Wis. 456, 195 N. W. 407, 29 A.L.R. 1280. Annotation: 29 A.L.R. 1287.

13 Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507.

14 Thompson v. Redington, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161; Aucutt v. Aucutt, 122 Tex. 518, 62 S. W. (2d) 77, 89 A.L.R. 1198.

15 People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

16 See infra, §§ 225 et seq.

17 See supra, §§ 180 et seq.

18 For delegation of legislative power, see infra, § 213.

19 Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658.

20 Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

1 Gregory v. State, 94 Ind. 384, 48 Am. Rep. 162; Re Huron, 58 Kan. 152, 48 P. 574, 36 L.R.A. 822, 62 Am. St. Rep. 614.

2 Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

3 Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

delegation to a ministerial officer of judicial power, however, it is not necessary that the adjudication be conclusive of the rights of the parties put in issue; if the officer is clothed with the power of adjudicating on, and protecting, the rights and interests of contesting parties, and the adjudication involves the construction and application of the law and affects the rights and interests of the parties, although not finally determining the rights, it is a judicial proceeding or the exercise of a judicial function.[4] The vesting of essentially judicial authority in an administrative board is not validated by providing for judicial review of its decisions.[5] The mere fact, however, that an appeal is provided for from the decision of a board appointed to determine claims does not render the powers of the board judicial in character.[6]

It is well settled that ministerial officers are incompetent to receive grants of judicial power from the legislature, and their acts in attempting to exercise such powers are necessarily nullities.[7] An act creating an executive tribunal with power to adjudicate disputes arising out of motor vehicle accidents on the highways of the state contravenes a distributive constitutional provision.[8] In one jurisdiction laws establishing the Torrens system of land registration, and providing for an examination by the recorder of deeds or registrar of titles of the facts in relation to the title to land and for the issuing of a certificate of ownership, have been held invalid as constituting an unconstitutional conferring of judicial power, even if the effect of such certificate is only to start the running of a statute of limitations.[9] There are, however, contrary rulings on this point in which it has been asserted that the determination by a registrar of deeds of the character of a title preparatory to the making of entries on the record in relation thereto is not an unconstitutional exercise of judicial power.[10]

In accordance with a strict interpretation of the general rule, it has been

4 People v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L.R.A. 105; Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

5 Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

6 Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398 (hearing, determination, taking evidence under sales tax law, with provision for judicial review); State v. Kelly, 27 N. M. 412, 202 P. 524, 21 A.L.R. 156 (claims against state).

A commission appointed to audit claims against a state and to provide for the payment or refunding of those allowed is not granted judicial functions within the meaning of the Constitution, because the state may elect any agency it chooses to determine the validity of claims against it. State v. Kelly, 27 N. M. 412, 202 P. 524, 21 A.L.R. 156.

A statute relating to the creation of a fund for the purpose of guaranteeing repayment of bank deposits of public funds and providing for the ascertainment by the attorney general and auditor of the state of the amount of public funds in any closed depository, and that such determination shall be final and have the same force and effect as an order of court except as to such depositors as shall make objection thereto in writing, in which case the matter is to be presented to the court, does not unconstitutionally vest judicial powers in ministerial officers, since these officers merely act as an auditing committee in behalf of the state, the final determination being left to the courts. Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359. Annotation: 104 A.L.R. 1373.

7 Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907; Otto v. Harllee, 119 Fla. 266, 161 So. 402, citing R. C. L.; People ex rel. Kern v. Chase, 165 Ill. 527, 46 N. E. 454, 36 L.R.A. 105; State v. Blaisdell, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; Com. v. Gryctko, 22 Pa. D. & C. 462, citing R. C. L.; Morrow v. Corbin, 122 Tex. 553, 62 S. W. (2d) 641, citing R. C. L.

8 Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.
Annotation: 110 A.L.R. 826.

The power of the legislature to prescribe terms upon which motor vehicles may be operated on the highways of the state does not extend to conditioning such operation on submission to administrative tribunals of disputes arising out of motor vehicle accidents. Re Opinion of Justices, 87 N. H. 492, 179 A. 344, 110 A.L.R. 819.

9 State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. Rep. 756.

10 People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L.R.A. 433, writ of error dismissed in 179 U. S. 405, 45 L. ed. 252, 21 S. Ct. 206; State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. Rep. 571; Drake v. Frazer, 105 Neb. 162, 179 N. W. 393, 11 A.L.R. 766; Ashton-Jenkins Co. v. Bramel, 56 Utah, 587, 192 P. 375, 11 A.L.R. 752.

held that a statute attempting to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or to testify on an examination as to an alleged offense is unconstitutional as conferring a judicial power on a nonjudicial officer;[11] for the same reason the courts in some jurisdictions hold that the power to punish for contempt cannot be thus vested in a notary public.[12] There is, however, authority to the contrary on the latter question.[13] It has also been held that a subordinate administrative or executive tribunal cannot be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.[14] Judicial power is also unconstitutionally conferred on nonjudicial officers by a provision of an old-age pension law requiring concurrence of the county commissioners in the determination by the county judge of the amount to be paid in individual cases and in the certificates to be issued by the county judge upon the authority of which pension payments are to be made, and further declaring that the decision of such county and board shall be final.[15] A statute which provides for the investigation by a commission into the sanity of anyone filing a plea of insanity and vesting in the commission the final power of determination is invalid for the same reason.[16]

The legislature cannot confer on persons other than the courts a discretion to fix terms of imprisonment.[17] For instance, the jury in a first degree murder case cannot be clothed with exclusive power to fix the extent of the punishment where the statute gives it only the power to decide which of alternative penalties shall be imposed.[18]

It has usually been held that statutes which seek to fix finally the amount of compensation to be received in condemnation proceedings are unconstitutional, since the power to determine ultimately the damages is a judicial power which may neither be usurped by the legislature nor delegated to nonjudicial officers.[19] The contrary position, however, has been maintained on the theory that such proceedings are largely administrative and that fixing the amount of damages is a step in such proceedings and is at most only quasi judicial.[20]

Numerous statutes which have been attacked as attempting to vest administrative officers with powers properly appertaining to the judicial departments of the government have been upheld. Among such laws may be mentioned those providing for the indeterminate sentence system with its credits for good behavior, the parole system, and the prison transfer system. Such attacks are usually grounded on the contention that the legislation assailed attempts to vest administrative officers with the judicial power of sentencing convicted persons or with the executive power of pardoning them.[1] A preliminary finding

11 Re Sims, 54 Kan. 1, 37 P. 135, 25 L.R.A. 110, 45 Am. St. Rep. 261.

12 Re Huron, 58 Kan. 152, 48 P. 574, 36 L.R.A. 822, 62 Am. St. Rep. 614.
For a general discussion as to the powers of commissioners, referees, and notaries to commit for contempt, see CONTEMPT, Vol. 12, §§ 50, 51, 52.

13 De Camp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056, 40 Am. St. Rep. 692.

14 Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125.

The power to fine and imprison for contempt is essentially a judicial one, and an attempt to confer it on a state board of tax commissioners which has power to take testimony is in violation of a distributive constitutional provision, since such board belongs to the executive or administrative department. Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L.R.A. 108.

15 Denver v. Lynch, 92 Colo. 102, 18 P. (2d) 907, 86 A.L.R. 907.
Annotation: 86 A.L.R. 913.

16 State v. Lange, 168 La. 958, 123 So. 639, 67 A.L.R. 1447.
Annotation: 67 A.L.R. 1451.

17 People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L.R.A. 285.

18 State v. Ramirez, 34 Idaho, 623, 203 P. 279, 29 A.L.R. 297.

19 Annotation: 74 A.L.R. 579.

20 Re Third Street, 177 Minn. 146, 225 N. W. 86, 74 A.L.R. 561; George v. Consolidated Lighting Co. 87 Vt. 411, 89 A. 635, 52 L.R.A.(N.S.) 850, Ann. Cas. 1916C, 416.

1 Laird v. Sims, 16 Ariz. 521, 147 P. 738,

of probable cause for the arrest of the accused is only a quasi judicial act, and is not such that because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal.[2] The same principle relates to the issuance of an attachment upon an affidavit stating grounds specified by statute[3] and to the issuance of warrants of arrest by clerks of court.[4] It has also been held that judicial power is not delegated to civil service commissioners by giving them authority to investigate matters as to the enforcement of the civil service law and complaints against officers, with the right to administer oaths and secure the attendance of witnesses by subpœna, and moreover providing that a court may compel obedience to such subpœna.[5] The general question has been raised with regard to the Workmen's Compensation Acts, and it has repeatedly been held that they are not an attempt to confer the judicial authority upon administrative boards and officers.[6]

In some of the cases, the courts have announced a very liberal rule, especially in relation to delegation to administrative boards. One court has said that it does not follow from pronouncements that judicial power may not be delegated, and that none but duly constituted constitutional courts may exercise judicial power, but that it may be delegated to, and exercised by, special tribunals or officers exercising quasi judicial functions and by purely administrative bodies upon which such functions have been conferred.[7]

§ 208. Legislative Assumption of Judicial Powers.—The uniform view held in this country at the present time is that the legislature does not inherently possess any judicial power[8] or any mixed jurisdiction which is partly legislative and partly judicial.[9] The doctrine as to the separation of the powers of the government into three distinct departments is considered sufficient to prevent the legislature from exercising any judicial function whatsoever, except such as may in terms be allowed to it by the Constitution itself.[10] It is not within

L.R.A.1915F, 519 (parole board); People v. Roth, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100; Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L.R.A. 109; State v. Wolfer, 119 Minn. 368, 138 N. W. 315, 42 L.R.A. (N.S.) 978, Ann. Cas. 1914A, 1248; Woods v. State, 130 Tenn. 100, 169 S. W. 558, L.R.A. 1915F, 531.

Annotation: 95 A.L.R. 1455 (prison transfer); L.R.A.1915F, 533 (parole board).

[2] Ocampo v. United States, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712.

[3] Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 S. Ct. 346.

[4] Kreulhaus v. Birmingham, 164 Ala. 623, 51 So. 297, 26 L.R.A.(N.S.) 492.

[5] People ex rel. Akin v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775, writ of error dismissed in 170 U. S. 182, 42 L. ed. 998, 18 S. Ct. 550.

See CIVIL SERVICE, Vol. 10, p. 925, § 5.

[6] Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10.

Annotation: 79 L. ed. 552; L.R.A.1916A, 425; L.R.A.1917D, 55; Ann. Cas. 1916B, 1286; Ann. Cas. 1918B, 612.

See WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 749, § 44].

[7] Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

[8] Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Guy v. Hermance, 5 Cal. 73, 63 Am. Dec. 85; Lane v. Doe, 4 Ill. 238, 36 Am. Dec. 543.

[9] Ervine's Appeal, 16 Pa. 256, 55 Am. Dec. 499.

[10] Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426; State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416; People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890; Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334; State ex rel. Hovey v. Noble, 118 Ind. 350, 21 N. E. 244, 4 L.R.A. 101, 10 Am. St. Rep. 143; Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L.R.A. 808.

The legislative attempt to confer upon a father the right to grant the custody of his children to the exclusion of their mother is an unconstitutional exercise of judicial power. Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781.

the power of the legislature to change the nature of a judicial function by merely creating another agency to participate in its performance,[11] or generally to invoke or set in motion any public or private law for the purpose of securing to individuals any remedy or relief from alleged wrongs.[12] In accordance with these principles, it has been held that a provision in an appropriation act that the salary for a certain office be paid to a certain person named, and none other, is void as an attempt to exercise judicial powers by declaring who is the legal officer entitled to the salary.[13]

In the determination of whether a statute is invalid as a legislative assumption of judicial power, it is of importance to note whether, under the proceeding authorized by such statute, all questions of a judicial nature are left to the judgment of the courts.[14] The technique used by the lawmakers in approaching a problem is not necessarily indicative of legislative assumption of judicial functions. The employment by legislative bodies or administrative agencies of methods of procedure which resemble those employed or required in judicial tribunals in conducting investigations does not constitute an exercise of the judicial power exclusively vested by the Constitution in the courts or amount to a usurpation of judicial powers, when employed in investigation, in aid of prospective legislation, into the existence of a reputed combination of manufacturers and dealers in cement, which combination, possibly, has the effect of creating a monopoly and violating the state anti-trust act. Nor is the inquiry of a judicial nature because the investigation is limited to the operations of a single industry where such a reputed combination operates to enhance the cost of public improvements.[15]

In spite of a general acquiescence in the principle that the legislature may not assume judicial powers, many attempts, and some successful ones, have been made to create exceptions to the rule. One of the most important of these consists of legislative divorces, although it is generally recognized that the granting of a divorce is a matter for the judiciary.[16]

There is a division of authority as to whether statutes restricting a remedy by injunction in labor disputes are invalid as an improper usurpation of judicial authority by the legislature.[17] The provisions of the various United States laws relating to the question have been held not to be invalid on this ground.[18] The state courts, however, have arrived at diverse conclusions on

The legislature cannot conduct a public or judicial investigation of charges made against any private institution or individual under the pretense or cloak of its power to investigate for the purposes of legislation. Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334. Annotation: 9 A.L.R. 1341, 1343 et seq.

A board of equalization consisting of the county commissioners and county assessors, created for the purpose of equalizing assessments and adjusting individual assessments, may be given judicial powers under a constitutional provision that the judicial power of the state shall be vested in certain courts "and such other courts, commissioners, or boards" as may be established by law. Hopper v. Oklahoma County, 43 Okla. 288, 143 P. 4, L.R.A.1915B, 875.

[11] State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416.

[12] Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102, 9 A.L.R. 1334.

[13] State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L.R.A. 177, 28 Am. St. Rep. 163.

[14] Florentine v. Barton, 2 Wall. (U. S.) 210, 17 L. ed. 783; People ex rel. Atty. Gen. v. Donovan, 228 Mich. 520, 200 N. W. 357, citing R. C. L. (opinion of Fellows, J.).

[15] Re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497.

[16] Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 S. Ct. 723; Bingham v. Miller, 17 Ohio, 445, 49 Am. Dec. 471.

[17] Annotation: 27 A.L.R. 411, s. 35 A.L.R. 460, and 97 A.L.R. 1336.

[18] Annotation: 35 A.L.R. 460, s. 97 A.L.R. 1337.

The Clayton Act, § 21, giving the right to a jury trial to persons charged with contempt in violating an injunction order where the act done is of such a character as to constitute also a criminal offense, is not unconstitutional as attempting to abridge the judicial power vested in the Federal courts by U. S. Const. Art. 3, § 1, by materially impairing an inherent

this question.[19] Some courts have held that such statutes do not, if they merely prohibit the issuance of injunctions against peaceable acts of picketing and persuasion, unconstitutionally abridge or usurp the powers of the courts because the statutes do not deprive the courts of jurisdiction to restrain any unlawful act or to determine whether any act complained of is legal or illegal.[20] Other courts have taken the position that the varied provisions of such laws are invalid in improperly limiting the powers or usurping the authority of the judiciary.[1] A somewhat similar statute providing that injunctions shall not be issued to restrain the collection of any tax or a sale of property for nonpayment of a tax, except in certain cases, and that anyone deeming himself to have been unlawfully taxed, and paying the tax under protest, may bring an action at law for its recovery, has been held valid.[2]

§ 209. —Legislative Recitals of Law and Fact.—The legislatures of the several states have occasionally attempted to incorporate in statutes statements of fact or conclusions of law, and the question may arise as to whether this amounts to an improper assumption of judicial power. The legislature has power to prescribe legal definitions of its own language, and such a definition is binding on the courts.[3] The legislature in some jurisdictions also has the power to declare by subsequent statute the construction of previous statutes, so as to bind the courts in reference to all transactions occurring after the passage of the law, and thereby enunciate the rule to govern the courts in transactions that are past, provided no constitutional rights of any parties are prejudiced.[4] This is an invasion of the judicial power, however, even in such jurisdictions, if it purports to affect pending cases.[5] The rule is recognized elsewhere that the legislature cannot pass any declaratory act, or act declaratory of what the law was before its passage, so as to give it any binding weight with the courts.[6] A legislative definition of a word as used in a statute is not conclusive of its meaning as used elsewhere; otherwise, the legislature would be usurping a judicial function in defining a term.[7]

A statute declaring or reciting a fact which the legislature has ascertained by investigation, in order to apply the proper remedy by legislation, is not con-

attribute of such power. Michaelson v. United States, 266 U. S. 42, 69 L. ed. 162, 45 S. Ct. 18, 35 A.L.R. 451. Annotation: 35 A.L.R. 460.

The Clayton Act, § 20, restricting the issuance of injunctions in labor disputes, is not unconstitutional as attempting to abridge the judicial power vested in the Federal courts by U. S. Const. Art. 3, § 1, by materially impairing an inherent attribute of such power. Annotation: 97 A.L.R. 1337.

The provisions of the Norris-La Guardia Act are not an unwarranted and unconstitutional attempt by Congress to invade the province and to usurp the functions of Federal courts, since all such courts, inferior to the Supreme Court, are dependent for their very creation upon the will of Congress and have only such jurisdiction as is conferred upon them by Congress, which may either destroy, in whole or in part, or limit such jurisdiction as it deems advisable. Annotation: 97 A.L.R. 1337.

19 Annotation: 27 A.L.R. 412, s. 97 A.L.R. 1336, 1337.

20 Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645. Annotation: 97 A.L.R. 1337.

1 Annotation: 27 A.L.R. 412, s. 97 A.L.R. 1336, 1337.

2 Casco Co. v. Thurston County, 163 Wash. 666, 2 P. (2d) 677, 77 A.L.R. 622.

3 Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 S. Ct. 286; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

4 Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; Stockdale v. Atlantic Ins. Co. 20 Wall. (U. S.) 323, 22 L. ed. 348.

5 Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Titusville Iron-Works v. Keystone Oil Co. 122 Pa. 627, 15 A. 917, 1 L.R.A. 361.

6 Lindsay v. United States Sav. & L. Asso. 120 Ala. 156, 24 So. 171, 42 L.R.A. 783, later appeal in 127 Ala. 366, 28 So. 717, 51 L.R.A. 393; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L.R.A. 777, 12 Am. St. Rep. 663; Straub v. Lyman Land & Invest. Co. 30 S. D. 310, 31 S. D. 571, 138 N. W. 957, 141 N. W. 979, 46 L.R.A.(N.S.) 941.

7 Legum v. Carlin, 168 Md. 191, 177 A. 287, 99 A.L.R. 536.

sidered a usurpation of judicial power.[8] Thus, the declaration by the legislature that the drainage of the water from agricultural lands shall be considered a public benefit for which the power of eminent domain may be exercised, in a statute providing a general plan or scheme for the reclamation of the wet or marsh lands of the state, does not infringe the power of the judiciary.[9] It has also been held that the legislature does not exercise judicial functions by declaring that the use of natural gas in flambeau lights is a wasteful and extravagant use,[10] or that the emission of dense smoke into the open air in cities having a population of one hundred thousand inhabitants is a nuisance.[11] The subject of the power of the legislature to determine facts has already been considered.[12]

§ 210. —Enabling and Curative Laws as Exercise of Judicial Power.—The general prohibition against interference by the legislature in regard to the rights of parties is limited in some cases by the operation of another principle which under certain circumstances permits the legislature, when not restricted by constitutional limitations other than those inherent in the doctrine of the separation of the powers of government, to enact laws authorizing or confirming particular acts, such as the sale of the land of persons under disability[13] or the curing of defects in past transactions.[14] Such statutes, so far as they do not deprive any person of any right, are not unconstitutional as encroaching on the prerogative of the judicial department of the government.[15] On the other hand, if a special act divests a person's rights, for example, an act authorizing a guardian to sell the ward's lands to pay his ancestor's debts, it is judicial in its character and unconstitutional, and it is immaterial that the infant has consented to the passage of the act.[16]

The legislature cannot prevent judicial inquiry as to the validity of the passage of a law by curative measures. The lawmakers usurp judicial power if they attempt to divest judicial control as to the question of the validity of the passage of a law. Thus, a statute intended to cure the invalidity of earlier legislation, which the governor approved after the time limit fixed by the Constitution for his approval, by providing that all bills passed and approved by the governor shall be presumed to have been presented to him for approval

8 McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477.

A legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts, but a declaration by a legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect. Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165, reversing Hirsh v. Block, 50 App. D. C 56, 267 F. 614, 11 A.L.R. 1238.

9 Sisson v. Buena Vista County, 128 Iowa, 442, 104 N. W. 454, 70 L.R.A. 440.

10 Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477.

11 State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402.

12 See supra, § 142.

13 Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585 (guardian's sale); Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873 (sale by administratrix to pay debts of deceased); Todd v. Flournoy, 56 Ala. 99, 28 Am. Rep. 758; Doe ex dem. Chandler v. Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732 (sale by administrator of lands of infant heirs); Louisville, N. O. & T. R. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 16 L.R.A. 251, 30 Am. St. Rep. 599.

Annotation: 4 A.L.R. 1552 (guardian's sale); 16 L.R.A. 251 et seq.

14 Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542 (confirming void sale by executrix).

For a general discussion, see ACKNOWLEDGMENTS, Vol. 1, p. 370, § 132.

See also infra, §§ 379 et seq., and Vol. 12, Subd. XI.

15 Linsley v. Hubbard, 44 Conn. 109, 26 Am. Rep. 431; Davison v. Johonnot, 7 Met. (Mass.) 388, 41 Am. Dec. 448; Louisville, N. O. & T. R. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 16 L.R.A. 251, 30 Am. St. Rep. 599; Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159; Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148.

Annotation: 4 A.L.R. 1552 (guardian's sale).

16 Jones v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

Annotation: 4 A.L.R. 1554.

within three days preceding approval, and declaring valid such presentation of bills to the governor as may have been made, whatever the irregularity of time, place, and manner, is unconstitutional as encroaching upon judicial authority.[17]

§ 211. —Legislative Interference in Litigation.—Since the legislature does not possess and may not assume the exercise of judicial powers, it cannot interfere in any way with pending judicial controversies[18] or change procedure affecting past transactions in such a way as to prevent judicial control of such situations.[19]

As a general rule, the lawmakers cannot annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction[20] or affect the process lawfully ordered by the court for its execution.[1] This rule has been applied to civil judgments generally,[2] judgments relating to taxes,[3] and judgments in criminal cases.[4]

The legislature cannot take particular cases out of a settled course of judicial proceedings,[5] grant a rehearing or appeal after the parties to a final judgment have lost the right to any further hearing,[6] revive a judgment which has expired,[7] validate a judgment void for want of jurisdiction and sales made under it,[8] grant new trials,[9] order the discharge of offenders,[10] require that a certain deposition be read in the trial of a cause then pending,[11] provide for the sale of a decedent's land without notice to the heirs and for the application of the proceeds to certain claims,[12] or direct the steps which shall be taken in the progress of a judicial inquiry.[13] Any other rule would seriously interfere with the discretion and independence of the judiciary.[14]

Other legislative acts have been held not to be an invalid assumption of judicial powers. Thus, a statute operating to preclude the court from commenting to the jury on the evidence is not invalid as a legislative encroachment on the inherent powers of the judiciary.[15] Nor is an unconstitutional assumption of judicial functions made by the enactment of a statute which discharges a motion for a new trial by operation of law if not acted upon at the same term.[16] Such a statute is valid because by its enactment the legislature does not direct a judgment, but merely removes an obstacle to a judgment already entered. The legislature possesses the power to enact a statute of limitations for motions for a new trial in the same manner as it possesses the power to enact such a statute for the bringing of an action.[17] The Supreme Court has also declared that construing the repeal by a statute of all laws empowering telegraph com-

17 Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426.
Annotation: 70 A.L.R. 1438.

18 Miller v. Hay, 143 Miss. 471, 109 So. 16, citing R. C. L. (attempt by legislature to abate a suit and give permission to others to revive it); Hoke v. Henderson, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677, overruled on another point in Mial v. Ellington, 134 N. C. 131, 46 S. E. 961, 65 L.R.A. 697; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Re Cannon, 206 Wis. 374, 240 N. W. 441, citing R. C. L.

A statute imposing a liability on municipal corporations for mob violence is not unconstitutional as an exercise of judicial power, because it does not adjudicate any transaction, case, or controversy which arose before its enactment and of which the judicial tribunals might have been cognizant, but rather becomes binding on the courts after enactment so that it is not in any sense a trespass upon the province of the courts. Champaign County v. Church, 62 Ohio St. 318, 57 N. E. 50, 48 L.R.A. 738, 78 Am. St. Rep. 718. Annotation: 13 A.L.R. 758.

19 Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426.

20 McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 S. Ct. 134; United States v. Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; United States v. Peters, 5 Cranch (U. S.) 115, 3 L. ed. 53; Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639; People ex rel. Lafferty v. Owen, 286 Ill. 638, 122 N. E. 132, 3 A.L.R. 447; Kansas City L. Ins. Co. v. Anthony, 142 Kan. 670, 52 P. (2d) 1208, 104 A.L.R. 364; Dorsey v. Dorsey, 37 Md. 64, 11 Am. Rep. 528; Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L.R.A. 285; Re Siblerud, 148 Minn. 347, 182 N. W. 168, citing R. C. L.; Ex parte Darling, 16 Nev. 98, 40 Am. Rep. 495; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L.R.A. 304, 26 Am. St. Rep. 464; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257; Com. ex rel. Johnson v. Halloway, 42 Pa. 446, 82 Am. Dec. 526; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Ratcliffe v. Anderson, 31 Gratt. (Va.) 105, 31 Am. Rep. 716; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L.R.A.1917A, 1244; Springstun v. Springstun, 131 Wash. 109, 229 P. 14, 40 A.L.R. 595; Re Cannon, 206 Wis. 374, 240 N. W. 441, citing R. C. L.
Annotation: 3 A.L.R. 451.
As to curative acts impairing judgments, see infra, § 212.

1 Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

2 McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 S. Ct. 134; United States v. Peters, 5 Cranch (U. S.) 115, 3 L. ed. 53; Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639; Kansas City L. Ins. Co. v. Anthony, 142 Kan. 670, 52 P. (2d) 1208, 104 A.L.R. 364; Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L.R.A. 304, 26 Am. St. Rep. 464; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878.
Annotation: 3 A.L.R. 453 et seq.

A state statute enacted to meet the existing economic emergency, but not by its terms limited as to duration, in effect annulling valid deficiency judgments in proceedings to foreclose liens or after sale under deeds of trust, violates a state constitutional provision requiring the separation of the three powers of government. Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836.

The legislature cannot validate the organization of a high school district after it has been declared void by final judgment of a court of competent jurisdiction. People ex rel. Lafferty v. Owen, 286 Ill. 638, 122 N. E. 132, 3 A.L.R. 447.

3 Annotation: 3 A.L.R. 456.

4 People v. Cummings, 88 Mich. 249, 50 N. W. 310, 14 L.R.A. 285; Ex parte Darling, 16 Nev. 98, 40 Am. Rep. 495; Com. ex rel. Johnson v. Halloway, 42 Pa. 446, 82 Am. Dec. 526.
Annotation: 3 A.L.R. 457.

5 Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Baggs Appeal, 43 Pa. 512, 82 Am. Dec. 583; State v. Fleming, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73; Re Cannon, 206 Wis. 374, 240 N. W. 441, citing R. C. L.

Congress can neither withdraw from judicial cognizance any matter which from its nature was the substance of a suit at common law, in equity, or admiralty, nor bring under the judicial power a matter which from its nature is not a subject for judicial determination. Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. (U. S.) 272, 15 L. ed. 372.

6 Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Handley's Estate, 15 Utah, 212, 49 P. 829, 62 Am. St. Rep. 926; Staniford v. Barry, 1 Aik. (Vt.) 314, 15 Am. Dec. 691.

Under the Oregon Constitution, art. 3, § 1, the Oregon statute which, after reciting that certain sections of the Code had created doubts as to whether the time to take an appeal ran from the date of the entry of the judgment or from the entry of the order granting or denying a new trial, provided that appeals filed within six months after the denial of a motion for new trial should be validated is unconstitutional as an encroachment on judicial powers in that it grants no new right of appeal, but construes former enactments. Macartney v. Shipherd, 60 Or. 133, 117 P. 814, Ann. Cas. 1913D, 1257.

7 Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Tate v. Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221.

8 Pryor v. Downey, 50 Cal. 388, 9 Am. Rep. 656.

9 Young v. State Bank, 4 Ind. 301, 58 Am. Dec. 630; Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533; Dorsey v. Dorsey, 37 Md. 64, 11 Am. Rep. 528; Denny v. Mattoon, 2 Allen (Mass.) 361, 79 Am. Dec. 784; Re Siblerud, 148 Minn. 347, 182 N. W. 168, citing R. C. L.; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Herndon v. Imperial F. Ins. Co. 111 N. C. 384, 16 S. E. 465, 18 L.R.A. 547; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570.
Annotation: 53 Am. Dec. 632; 79 Am. Dec. 796.

At an early day it was considered to be within the power of the legislature to grant new trials, and the power was sometimes exercised. Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.

10 Allen v. State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L.R.A. 117, 80 Am. St. Rep. 573; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.

11 Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.; Dupy v. Wickwire, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.
Annotation: 6 Am. Dec. 731.

12 Lane v. Doe, 4 Ill. 238, 36 Am. Dec. 543; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.

The House of Representatives in passing a resolution reciting that the United States is a creditor of Jay Cooke & Company and appointing a committee to inquire into the nature and history of the real-estate pool not only exceeded its own authority, but assumed a power belonging to the judicial department. Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

13 Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 S. Ct. 722; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.

14 Lawson v. Jeffries, 47 Miss. 686, 12 Am. Rep. 342; Roles Shingle Co. v. Bergerson, 142 Or. 131, 19 P. (2d) 94, citing R. C. L.

15 People v. Kelly, 347 Ill. 221, 179 N. E. 898, 80 A.L.R. 890.

16 James v. Appel, 192 U. S. 129, 48 L. ed. 377, 24 S. Ct. 222.

17 Ibid.

panies to condemn the rights of way of railway companies as applicable to a condemnation proceeding begun under authority of a previous statute and pending at the date of such repeal on appeal from a judgment in favor of a telegraph company, followed by payment of the award into court, does not render such a repealing act invalid as a legislative interference with judicial proceedings.[18] Such an act does not affect litigation of private rights and relations, but has a different purpose, being directed to that which is conceived to concern the public interest—an exertion of power in the public interest of which the companies are the instruments or agents.[19] Moreover, the Supreme Court has held that the exigency occasioned by the judicial duty to enforce a judgment of the Federal Supreme Court in a suit between states, founded upon a compact between those states and assented to by Congress, can be met by the creation by Congress of new remedies,[20] since to provide by legislative action additional process relevant to the enforcement of judicial authority is the exercise of a legislative, and not a judicial, power.[1]

§ 212. —Curative Statute Impairing Judgment.—A marked conflict of opinion has appeared in the decisions as to the power of a legislature to enact a curative statute which applies to a controversy in which a final judgment has been entered by a court of competent jurisdiction.[2] In a majority of cases the legislature has been held to have the power to enact a curative statute applicable to such a controversy, even though the statute renders ineffective a final judgment of the court.[3] On the other hand, in some jurisdictions it has been held that the legislature has no such power.[4]

[18] Western U. Teleg. Co. v. Louisville & N. R. Co. 258 U. S. 13, 66 L. ed. 437, 42 S. Ct. 258.

[19] Ibid.

[20] Virginia v. West Virginia, 246 U. S. 565, 62 L. ed. 883, 38 S. Ct. 400.

[1] Ibid.

[2] Annotation: 25 A.L.R. 1136.

[3] Pennsylvania v. Wheeling & B. Bridge Co. 18 How. (U. S.) 421, 15 L. ed. 435; Richman v. Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L.R.A. 445, 14 Am. St. Rep. 308; Nottage v. Portland, 35 Or. 539, 58 P. 883, 76 Am. St. Rep. 513; Donley v. Pittsburgh, 147 Pa. 348, 23 A. 394, 30 Am. St. Rep. 738; Hodges v. Snyder, 45 S. D. 149, 186 N. W. 867, 25 A.L.R. 1128, affirmed in 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435.
Annotation: 25 A.L.R. 1136.
"Why is it that the courts hold that curative legislation, enacted after suit brought, or even after judgment and pending appeal, controls the final determination of the action? Simply because such legislation is not an attempted exercise of judicial power, or an attempt to control or reverse the action of the court, but is a proper exercise of legislative functions, and its effect is simply to remove that which otherwise must control the action of the court. As stated in 2 Lewis's Sutherland, Stat. Constr. p. 1237: 'It is no objection to a curative act that it validates what has previously been declared invalid in a judicial proceeding. The judgment may furnish the occasion for the act. Of course, the legislature cannot annul or set aside the judgment of a court, but it may remove a defect from which the judgment proceeded.'" Chicago, R. I. & P. R. Co. v. Austin, 63 Okla. 169, 163 P. 517, L.R.A. 1917D, 666; Hodges v. Snyder, 45 S. D. 149, 186 N. W. 867, 25 A.L.R. 1128, affirmed in 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435.
"It is true that the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. This rule, however, does not apply to a suit brought for the enforcement of a public right which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation, and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away." Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435, affirming 45 S. D. 149, 186 N. W. 867, 25 A.L.R. 1128.
Congress cannot amend a judgment upon private rights, but can amend one founded on interference with a public right under the regulation of Congress. Pennsylvania v. Wheeling & B. Bridge Co. 18 How. (U. S.) 421, 15 L. ed. 435.
An act of Congress declaring a bridge over the Ohio River a lawful structure supersedes a previous continuing and executory decree of the court declaring it an obstruction to navigation and directing its removal. Ibid.
Under the power to regulate commerce an act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gives the rule of decision for the court at the final hearing. Clinton Bridge (Gray v. Chicago, I. & N. R. Co.) 10 Wall. (U. S.) 454, 19 L. ed. 969.

[4] Merchants Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715.
Annotation: 25 A.L.R. 1137.

Curative statutes in jurisdictions where the majority view obtains have frequently been held to be valid although they purported to validate local assessments previously declared to be invalid by final judgments of courts.[5] On the other hand, the courts which hold that it is not competent for the legislature to enact curative statutes have, in several cases, applied the rule to statutes purporting to legalize invalid local assessments.[6] In a similar fashion, curative statutes purporting to validate tax levies,[7] municipal bonds,[8] and the organization of school districts[9] have been sustained as a valid exercise of legislative power or overthrown as an improper legislative attempt to usurp judicial authority, depending upon whether the jurisdiction in which they arose followed the majority or minority viewpoint on this question.

§ 213. —Miscellaneous Attempts to Exercise Judicial Power.—In many different ways and in varied types of controversies the question has arisen as to whether authority attempted to be exercised by the legislative department is actually judicial, and therefore unconstitutionally assumed. In some cases the violation of constitutional inhibitions is clear, as, for example, where the legislature attempts to validate the presentation of bills or acts to the governor however far the time of presentation may depart from a constitutional requirement.[10] The legislature cannot, upon passing a law which violates a constitutional provision, validate it so as to prevent an attack thereon in the courts, by a declaration that it shall be so construed as not to violate the constitutional inhibition.[11]

In addition to the granting of legislative divorces already mentioned,[12] various other attempts have been made to establish by legislative decree the status of individuals. It has been held that the legislature cannot assume the right to pass on the question of the release of one committed to a hospital for criminal insane, and thereby deprive the courts of their jurisdiction to inquire into the legality of his restraint;[13] and in some cases it has been decided that the legislature is powerless to restore the competency of a particular witness rendered incompetent by reason of conviction of felony,[14] although elsewhere the conclusion that such a statute violates the Constitution by assuming judicial power has been denied.[15]

It seems that the legislature would be usurping judicial power if it should adjudicate an act unlawful and presumptively injurious and dangerous as a nuisance, when it is not so, and should command the courts to enjoin it without proof that any injury or danger has been or will be caused by it.[16] On the

[5] Richman v. Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L.R.A. 445, 14 Am. St. Rep. 308; Nottage v. Portland, 35 Or. 539, 58 P. 883, 76 Am. St. Rep. 513.
Annotation: 25 A.L.R. 1137.

[6] Annotation: 25 A.L.R. 1139.

[7] Annotation: 25 A.L.R. 1139.

[8] Annotation: 25 A.L.R. 1141.

[9] Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435, affirming 45 S. D. 149, 186 N. W. 867, 25 A.L.R. 1128.
Annotation: 25 A.L.R. 1141.

[10] Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426.

[11] State ex rel. DuFresne v. Leslie, 100 Mont. 449, 50 P. (2d) 959, 101 A.L.R. 1329, holding that a provision of a statute permitting the payment of delinquent taxes in instalments, that it shall not be deemed or construed to be a release or postponement of any tax or assessment due—a thing which the legislature is prohibited by the state Constitution from doing—is invalid as an attempt to extinguish or limit the power to interpret constitutional and statutory provisions vested by the Constitution exclusively in the courts.

[12] See supra, § 208.

[13] Re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L.R.A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[14] State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Underwood v. State, 111 Tex. Crim. Rep. 124, 12 S. W. (2d) 206, 63 A.L.R. 978.
Annotation: 63 A.L.R. 982, 983.

[15] Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.
Annotation: 63 A.L.R. 983.

[16] Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L.R.A. 808, 20 Am. St. Rep. 123.

other hand, the passage by the legislature of a statute which creates a prima facie rule of evidence in a criminal case, as, for example, stating that one found in possession of stolen goods shortly after a larceny should prima facie be presumed to be the thief, is not invalid as an encroachment upon judicial power,[17] although a similar statute stating that a presumption of intent to commit any felony which may have been committed by a person under charge while armed shall follow from such a person being so armed without a permit has been held unconstitutional.[18]

Although the legislature may control many of the details,[19] in the final analysis the judicial department has power to determine who shall practice law. No statute can control the judicial department in the performance of its duty in this regard.[20] Whether the examinations of applicants for admission to the bar shall be wholly written or wholly oral or partly written and partly oral is a matter for final determination by the judicial department, as is the relative weight to be attributed to the results of such examinations.[1] Consequently, a statute prohibiting the marking of examination papers of applicants by any person not a member of the board of bar examiners involves a usurpation of the functions of the judiciary.[2] A statute, however, which prohibits the unlicensed practice of law is not a usurpation of judicial power.[3] Furthermore, a statute respecting admission to the bar, which prescribes appropriate instrumentalities for the ascertainment of qualifications of applicants, is no encroachment on the judicial department so long as it does not infringe on the right of the judiciary to determine who shall exercise the privilege of practicing in the courts and under what circumstances and with what qualifications persons shall be admitted to that end.[4] Moreover, a statute prohibiting the disbarment of an attorney for acts involving moral turpitude, not connected with his professional or official duty as an attorney, until after conviction therefor, is not invalid.[5] Furthermore, an act giving a right to trial by jury in disbarment cases is not an unconstitutional encroachment upon the judicial power.[6]

The giving of a right to trial by jury in cases of proceedings for contempt in violation of injunctions by acts which are also criminal is not unconstitutional as interfering with the inherent power of the lower Federal courts to punish for contempt.[7] Nor is a limitation by the legislature of the term for which imprisonment may be imposed for contempt of court unconstitutional.[8]

17 State v. Thomas, 144 Ala. 77, 40 So. 271, 2 L.R.A.(N.S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007.
Annotation: L.R.A.1915C, 723, 727.
Congress did not unconstitutionally exercise judicial power by enacting the provisions of the Act of June 29, 1906, § 15, under which certificates of naturalization theretofore issued ex parte in the ordinary way may be impeached where fraudulently and illegally procured by perjured testimony. Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613.

18 Powers v. State, 204 Ind. 472, 184 N. E. 549, 86 A.L.R. 166.

19 See ATTORNEYS AT LAW, Vol. 5, p. 273, § 19.

20 Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

1 Ibid.

2 Ibid.
As to the power of the courts generally to prescribe the qualifications of candidates for admission to the bar, see ATTORNEYS AT LAW, Vol. 5, p. 273, § 19.

3 Berk v. State, 225 Ala. 324, 142 So. 832, 84 A.L.R. 740.

4 Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059.

5 Re Saddler, 35 Okla. 510, 130 P. 906, 44 L.R.A.(N.S.) 1195.
Annotation: 44 L.R.A.(N.S.) 1195.
For a general discussion relating to disbarment and causes therefor, see ATTORNEYS AT LAW, Vol. 5, p. 411, §§ 251 et seq.

6 State Law Examiners v. Phelan, 43 Wyo. 481, 5 P. (2d) 263, 78 A.L.R. 1317.
Annotation: 78 A.L.R. 1323.
As to right to jury trial generally in disbarment proceedings, see ATTORNEYS AT LAW, Vol. 5, p. 441, § 297.

7 Michaelson v. United States, 266 U. S. 42, 69 L. ed. 162, 45 S. Ct. 18, 35 A.L.R. 451.

8 Ex parte Creasy, 243 Mo. 679, 148 S. W. 914, 41 L.R.A.(N.S.) 478, overruling any statements to the contrary in State ex rel. Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624, and in Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749.

In some jurisdictions inquiry by the legislature to determine whether a default has happened, on which it reserved the right to repeal an act of incorporation, is not treated as a judicial adjudication beyond the powers of the legislature.[9] In other jurisdictions the legislature cannot determine for itself questions of fact, such as whether a particular corporation has violated provisions of its charter, and rest on such determination legislative decrees adjudicating the forfeiture of private rights without any judicial hearing.[10]

Although the legislature may provide for the payment of a moral obligation by a municipal body without invading the powers of the judiciary,[11] it is generally held that a statute requiring a county or municipality to pay a claim against it, which also fixes the amount of the claim, is—especially under the more modern view—invalid as an attempted encroachment upon the judicial power.[12]

Statutes providing for refunds of taxes illegally or erroneously exacted are not regarded as an exercise of judicial function by the legislature.[13]

C. Delegation of Powers

1. Purely or Primarily Legislative

a. In General

§ 214. Generally.—Since under the doctrine of the separation of the powers of government[14] the lawmaking function is assigned exclusively to the legislature,[15] it is a cardinal principle of representative government that except when authorized by the Constitution[16]—as may be the case in reference to municipal corporations[17]—the legislature cannot delegate the power to make laws to any other authority or body.[18] Any attempt to abdicate legislative power in any

9 Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

10 Flint & F. Pl. Road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233.

11 Annotation: L.R.A.1917E, 829.

12 Harris v. Allegany County, 130 Md. 488, 100 A. 733, L.R.A.1917E, 824; Board of Education v. State, 51 Ohio St. 531, 38 N. E. 614, 25 L.R.A. 770, 46 Am. St. Rep. 588; State ex rel. McCurdy v. Tappan, 29 Wis. 664, 9 Am. Rep. 622.
Annotation: L.R.A.1917E, 827 et seq., 832.

13 Annotation: 98 A.L.R. 286.
A statute which requires the county commissioners to refund proportionately liquor license fees because the sale of intoxicating liquors thereunder has become illegal under the law has been held to be the exercise by the legislature of legislative, not judicial, powers. Annotation: 98 A.L.R. 286.
A statute providing for the refund of inheritance taxes paid under an unconstitutional statute is not unconstitutional as invading the judicial power of the state vested in its courts, in directing the refund of a tax determined by the courts to be owing. Annotation: 98 A.L.R. 286.

14 See supra, §§ 180 et seq.

15 Pursley v. Ft. Myers, 87 Fla. 428, 100 So. 366, citing R. C. L.; Oakland State Bank v. Bolin, 141 Kan. 126, 40 P. (2d) 437, citing R. C. L.; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St. Rep. 650; State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.
Annotation: 79 L. ed. 476.

16 Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am. St. Rep. 122; Pursley v. Ft. Myers, 87 Fla. 428, 100 So. 366, citing R. C. L.; State v. Purcell, 39 Idaho, 642, 228 P. 796, citing R. C. L.; State v. Nelson, 36 Idaho, 713, 213 P. 358, citing R. C. L.; Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L.R.A. 152, 59 Am. St. Rep. 262; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; Re North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L.R.A. 638.

17 Pursley v. Ft. Myers, 87 Fla. 428, 100 So. 366, citing R. C. L.; Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L.R.A. 152, 59 Am. St. Rep. 262; Marion County v. Jewett, 184 Ind. 63, 110 N. E. 553, citing R. C. L. (county board); State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250.
As to the power of the legislature generally to vest local subdivisions with authority to legislate on local matters, see infra, §§ 223, 224.

18 **United States.** — United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42.
Alabama. — Whaley v. State, 168 Ala. 152, 52 So. 941, 30 L.R.A.(N.S.) 499.
Arizona. — Crane v. Frohmiller, 45 Ariz. 490, 45 P. (2d) 955, citing R. C. L.
Arkansas. — State v. Davis, 178 Ark. 153, 10 S. W. (2d) 513, citing R. C. L.

particular field, although valid in form, is unconstitutional and void.[19]

The legislature may not escape its duties and responsibilities by delegating such legislative powers to the people at large.[20] Thus, a state legislature may

California. — Dougherty v. Austin, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425.

Colorado. — Burcher v. People, 41 Colo. 495, 93 P. 14, 124 Am. St. Rep. 143.

Florida. — Pursley v. Ft. Myers, 87 Fla. 428, 100 So. 366, citing R. C. L.; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639.

Idaho. — State v. Purcell, 39 Idaho, 642, 228 P. 796, citing R. C. L.; State v. Nelson, 36 Idaho, 713, 213 P. 358, citing R. C. L.

Illinois. — People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Chicago R. Co. v. Commerce Commission, 336 Ill. 51, 167 N. E. 840, 67 A.L.R. 938; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357.

Indiana. — Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186, 907, 70 A.L.R. 1232; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Marion County v. Jewett, 184 Ind. 63, 110 N. E. 553, citing R. C. L.

Iowa. — Blume v. Crawford County, 217 Iowa, 545, 250 N. W. 733, 92 A.L.R. 757; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751, 6 L.R.A.(N.S.) 143; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L.R.A. 285, 64 Am. St. Rep. 157.

Kansas. — Langworthy v. Kadel, 141 Kan. 250, 40 P. (2d) 443, citing R. C. L.; State v. Crawford, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880; State v. Keener, 78 Kan. 649, 97 P. 860, 19 L.R.A.(N.S.) 615; State ex rel. Godard v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662, qualified on another point in State ex rel. Court of Industrial Relations v. Howat, 107 Kan. 423, 191 P. 585 (which has writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277) citing R. C. L.

Kentucky. — Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Com. v. Beaver Dam Coal Co. 194 Ky. 34, 237 S. W. 1086, 27 A.L.R. 920.

Louisiana. — State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72, citing R. C. L.; State v. Watkins, 176 La. 837, 147 So. 8, citing R. C. L.

Maine. — State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

Massachusetts. — Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 474, 86 N. E. 925, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439; Opinion of Justices (Re Municipal Suffrage to Women) 160 Mass. 586, 36 N. E. 488, 23 L.R.A. 113.

Minnesota. — Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542.

Missouri. — Lammert v. Lidwell, 62 Mo. 188, 21 Am. Rep. 411.

Nebraska. — Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686; Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056; State v. Elam, 91 Neb. 460, 136 N. W. 59, 39 L.R.A.(N.S.) 686.

Nevada. — Moore v. Humboldt County, 48 Nev. 397, 232 P. 1078, citing R. C. L.

New Jersey. — Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102.

New York. — Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506.

North Dakota. — Wilder v. Murphy, 56 N. D. 436, 218 N. W. 156, citing R. C. L.

Ohio. — Harmon v. State, 66 Ohio St. 249, 64 N. E. 117, 58 L.R.A. 618; Gordon v. State, 46 Ohio St. 607, 23 N. E. 63, 6 L.R.A. 749.

Oklahoma. — Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471.

Oregon. — Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68 A.L.R. 422; Korth v. Portland, 123 Or. 180, 261 P. 895, 58 A.L.R. 665; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424; State ex rel. Sherman v. George, 22 Or. 142, 29 P. 356, 16 L.R.A. 737, 29 Am. St. Rep. 586.

Pennsylvania. — American Baseball Club v. Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 386, appeal dismissed in 290 U. S. 595, 78 L. ed. 524, 54 S. Ct. 128; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St. Rep. 650; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716.

Texas. — Brown v. Humble Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Citizens' Guaranty State Bank v. National Surety Co. (Tex.) 258 S. W. 468, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781), citing R. C. L.

Virginia. — Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

Washington. — Chas. Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181.

Wisconsin. — State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L.R.A. 157, 60 Am. St. Rep. 123.

Annotation: 76 A.L.R. 1055 et seq.; 79 L. ed. 476 et seq.; 44 Am. St. Rep. 391.

That no part of the legislative power can be delegated by the legislature to any other department of the government, executive or judicial, is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the Constitution. Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.

[19] Johnson v. San Diego, 109 Cal. 468, 42 P. 249, 30 L.R.A. 178; Pursley v. Ft. Myers, 87 Fla. 428, 100 So. 366, citing R. C. L.; Oakland State Bank v. Bolin, 141 Kan. 126, 40 P. (2d) 437, citing R. C. L.; State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1; State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[20] Brawner v. Supervisors of Elections, 141 Md. 586, 119 A. 250, citing R. C. L.; People v. Kennedy, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914C, 616.

Annotation: 79 L. ed. 560.

There is some conflict of authority on the

not delegate its power by a referendum to a majority of the voters of a state voting at an election, except where the Constitution permits such reference.[1] It has been held, however, that if the Constitution is silent upon the mode of appointment to office, the legislature may delegate the power to the people to elect to every office, judicial or civil.[2]

The general doctrine as to the inalienability of the lawmaking function applies to the Federal Government.[3] Congress cannot delegate to any other body its strictly legislative powers.[4] This rule does not apply, however, to other powers not of a legislative character.[5]

In order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, it must appear that the power involved is purely legislative in nature—that is, one appertaining exclusively to the legislative department.[6] There are many powers so far legislative that they may properly be exercised by the legislature, but which may nevertheless be delegated,[7] since the legislature may delegate any technically nonlegislative power which it may itself lawfully exercise.[8] While it cannot abdicate its general lawmaking powers, it may authorize others to do things which it might properly do, but which it cannot conveniently or advantageously perform.[9] Furthermore, the difficulty in determining what powers may or may not be delegated seems

question discussed in the text statement. For details see infra, § 216.

[1] People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044.

A different conclusion is reached in such jurisdictions as South Dakota where it is held that the exercise of the referendum is not an exercise of delegated legislative power; it is in effect the exercise of the veto power. State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A. (N.S.) 206, Ann. Cas. 1916B, 860.

[2] Annotation: L.R.A.1916E, 848.

For a general discussion, see JUDGES [Also 15 R. C. L. p. 514, § 4]; PUBLIC OFFICERS [Also 22 R. C. L. p. 424, §§ 73 et seq.].

[3] Annotation: 79 L. ed. 476.

The source of the inhibition against the delegation of legislative power by the Congress is the provision of Article 1, § 1, of the Federal Constitution that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." There is no purpose avowed in the Federal Constitution to separate or distribute the powers of the government, such as appears in the state Constitutions, but the instrument actually makes a distribution of powers to the three departments. Annotation: 79 L. ed. 476.

[4] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996.

Delegation by Congress of its essential legislative functions is precluded by the provisions of the Federal Constitution, Art. 1, § 1, that all legislative powers granted to the Federal Government shall be vested in Congress, and of Art. 1, § 8, ¶ 18, empowering Congress to make all laws which shall be necessary and proper for carrying into execution its general powers. Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241.

[5] Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, 38 S. Ct. 159, L.R.A.1918C, 361, Ann. Cas. 1918B, 856; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 S. Ct. 436; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525.

Annotation: 79 L. ed. 484.

[6] People ex rel. Lindstrand v. Emmerson, 333 Ill. 606, 165 N. E. 217, 62 A.L.R. 912; Chicago v. Marriotto, 332 Ill. 44, 163 N. E. 369, 60 A.L.R. 501; Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932; State ex rel. Orr v. Kearns, 304 Mo. 685, 264 S. W. 775, citing R. C. L.; State v. Wells, F. & Co. 38 Nev. 505, 150 P. 836 (affirmed in 248 U. S. 165, 63 L. ed. 190, 39 S. Ct. 62) citing R. C. L.; Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68 A.L.R. 422; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.

Annotation: 79 L. ed. 484, 485.

[7] Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Where the legislature has authority to provide a governmental regulation and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature or indirectly by the legislative use of any appropriate instrumentality where no provision or principle of organic law is thereby violated. Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99.

[8] Annotation: 79 L. ed. 484, 485.

[9] Annotation: 79 L. ed. 484, 485.

in part to be due to a confusion between such strictly legislative powers coming within the constitutional limitation and such other powers as, although at times exercised by the legislature, are not strictly legislative and may be exercised in proper cases by persons belonging to the other departments of government.[10]

In those instances in which the legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses. It may also prescribe the manner and circumstances of the exercise of such power.[11]

The authority of the legislature to confer on executive officers the power to promulgate rules and regulations under certain circumstances is elsewhere considered.[12]

§ 215. Completeness of Statute.—One of the most important tests as to whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature. The generally recognized principle is that a law must be so complete in all its terms and provisions when it leaves the legislative branch of the government that nothing is left to the judgment of the electors or other appointee or delegate of the legislature.[13] The rights, duties, privileges, or obligations granted or imposed must be definitely fixed or determined, or the rules by which they are to be fixed and determined must be clearly and definitely established, when the act is passed by the legislature and approved by the governor.[14] The law must be perfect, final, and decisive in all of its parts, and the discretion which is given must relate only to execution.[15] One court has laid down the rule that in considering whether a section of a statute is complete or

10 Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.
Annotation: 79 L. ed. 484, 485.

11 Feek v. Bloomingdale, 82 Mich. 393, 47 N. W. 37, 10 L.R.A. 69.

12 See infra, §§ 240 et seq.

13 Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867, citing R. C. L.; Re Kinney, 53 Cal. App. 792, 200 P. 966, citing R. C. L.; Sapero v. State Medical Examiners, 90 Colo. 568, 11 P. (2d) 555, citing R. C. L.; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72, citing R. C. L.; State v. Watkins, 176 La. 837, 147 So. 8, citing R. C. L.; State v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; State ex rel. Ginocchio v. Shaughnessy, 47 Nev. 129, 217 P. 581, citing R. C. L.; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918E, 574; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238) citing R. C. L.; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.
Annotation: Ann. Cas. 1913E, 1000 (health regulation cases).

14 People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044.

15 Mutual Film Co. v. Industrial Commission, 236 U. S. 247, 59 L. ed. 561, 35 S. Ct. 393; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C. 296; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

Legislative power is not delegated by a statute conferring discretionary power upon county officers to waive or reduce the penalty or interest imposed upon delinquent taxpayers, if such action appears likely to facilitate the collection of taxes, since a law, to be complete, need not command to be done everything for which it provides. Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68 A.L.R. 422. Annotation: 68 A.L.R. 431, s. 79 A.L.R. 999.

So far as provisions of a statute empowering the state Public Service Commission to attach to the permit to be issued to a contract motor carrier upon the highways of the state "such terms and conditions as it may deem proper for the best interests of the public" are construed to permit the insertion of conditions other than those entirely within the purview of the explicit provisions of the statute, they involve an unconstitutional delegation of legislative power. Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

incomplete, the test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights and obligations thereunder.[16]

A statute will be held unconstitutional as an improper delegation of legislative power if it is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law,[17] because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid.[18] Thus, generally, statutes requiring protection against occupational or industrial diseases and accidents are invalid as an improper delegation of legislative authority if they are so incomplete when they leave the legislature as neither to define the contrivances to be procured nor to set up a recognizable criterion within fixed limitations nor to furnish a definition of what is approved and reasonable, but allow such matters, upon which criminal penalties and civil liability may be incurred, to be determined at the whim of administrative officers.[19] It has also been held that the legislature cannot delegate to a state board the power to revoke the license of a physician for making grossly improbable statements in an advertisement, without any definition of such term.[20] The same principle has frequently been applied in cases holding invalid as an unconstitutional delegation of power statutes authorizing a state insurance commissioner to prepare, approve, and adopt a so-called "standard fire insurance policy" to which, after a given date, all insurance contracts should be required to conform.[1] On the other hand, a statute requiring the insurance of property of the state and its political subdivisions in a state insurance fund does not, by directing the commissioner of insurance to prescribe the form of policies, delegate legislative power to an executive officer, where the statute declares the perils against which the insurance will be written and provides its own methods for determining the value of the property, so that the only form of policy the commissioner can prescribe is one insuring against the perils enumerated, stating in whose favor it is written, and the amount.[2]

16 People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500.

17 Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am. St. Rep. 122; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; Cancilla v. Gehlhar, 145 Or. 184, 27 P. (2d) 179, citing R. C. L. (approving rule but holding statute did not violate the rule).

18 Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607.

19 Annotation: 99 A.L.R. 613 et seq.

Discretion cannot be delegated by the legislature to the commissioner of the bureau of labor statistics to determine whether the liability to inhalation of dust or injurious gases in particular factories can to a great extent be prevented by some mechanical device the provision of which he shall recommend, and the failure to comply with the recommendation made a misdemeanor. Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am. St. Rep. 122. Annotation: 99 A.L.R. 614.

A statute requiring employers carrying on work which may produce an occupational disease to adopt and provide "reasonable and approved devices, means or methods" for the prevention of such disease, charging the state department of factory inspection with its enforcement and requiring employers upon notice from that department to install approved devices, means, or methods reasonably necessary, is unconstitutional as delegating legislative power to administrative officers. Vallat v. Radium Dial Co. 360 Ill. 407, 196 N. E. 485, 99 A.L.R. 607. Annotation: 99 A.L.R. 615, 616.

20 Hewitt v. State Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

1 King v. Concordia F. Ins. Co. 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L.R.A. 609, 50 Am. St. Rep. 400; Nalley v. Home Ins. Co. 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St. Rep. 650; State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L.R.A. 157, 60 Am. St. Rep. 123; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.
Annotation: 79 L. ed. 546; 6 Ann. Cas. 91; Ann. Cas. 1915A, 290.

2 State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581.

The principle that laws may be held unconstitutional on account of their incompleteness in form is limited by the operation of the further rule that to a certain extent matters of detail may be left to be filled in by rules and regulations to be adopted or promulgated by executive officers and administrative boards.[3]

§ 216. Laws Effective on Contingencies.—The rule is well settled that while the legislature may not delegate its power to make a law, it may make a law to become operative on the happening of a certain contingency or future event.[4] Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal.[5] The reason for this rule is that it is not always essential that a legislative act must in any event take effect as law after it leaves the hands of the legislature. If the law is in its provisions a complete statute in other respects, its taking effect may be made conditional upon some subsequent event. When that event happens, the statute takes effect and becomes the law by force of legislative action as fully as if the time when it should take effect had been unconditionally fixed.[6]

A valid contingency upon which a law may take effect may be the vote of the electors of a given territory or part of the state within which the law is to operate.[7] Included are miscellaneous local option matters such as laws

[3] See infra, § 240.

[4] Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; State v. Davis, 178 Ark. 153, 10 S. W. (2d) 513, citing R. C. L.; Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044 (recognizing rule); Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L.R.A. 84, 53 Am. St. Rep. 325; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A. (N.S.) 188; People v. Butte, 4 Mont. 174, 1 P. 414, 47 Am. Rep. 346; People v. Kennedy, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914C, 616; People v. Fire Asso. of Phila. 92 N. Y. 311, 44 Am. Rep. 380, affirmed in 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781), citing R. C. L.; State v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.

Annotation: 79 L. ed. 558; 18 Ann. Cas. 489.

[5] People v. Fire Asso. of Phila. 92 N. Y. 311, 44 Am. Rep. 380, affirmed in 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821.

The legislature may make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact on which the law makes its own action depend. Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718.

[6] Com. v. Beaver Dam Coal Co. 194 Ky. 34, 237 S. W. 1086, 27 A.L.R. 920; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; State v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; Ex parte Mode, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918E, 845.

Annotation: Ann. Cas. 1916A, 110.

[7] People v. McFadden, 81 Cal. 489, 22 P. 851, 15 Am. St. Rep. 66; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044 (recognizing rule); People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006; Waugh v. Glos, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259; Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46, 114 Am. St. Rep. 313; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A.(N.S.) 534; Com. v. Weller, 14 Bush (Ky.) 218, 29 Am. Rep. 407; Gretna v. Bailey, 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Williams v. Cammack, 27 Miss. 209, 61 Am. Dec. 508; State v. Chicago, B. & Q. R. Co. 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661; Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; People v. Kennedy, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914C, 616; People v. Fire Asso. of Phila. 92 N. Y. 311, 44 Am. Rep. 380, affirmed in 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Fouts v. Hood River, 46 Or. 492, 81 P. 370, 1 L.R.A.(N.S.) 483, 7 Ann. Cas. 1160; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St. Rep. 650; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781), citing R. C. L.; State v. Tausick, 64 Wash. 69, 116 P. 651, 35

relating to the running at large of animals,[8] the sale of intoxicating liquors,[9] the establishment of free schools,[10] the merger of school districts,[11] the creation of local offices,[12] the annexation of adjacent territory to a city,[13] grants of municipal powers,[14] the creation of a new county or other political subdivision,[15] and the creation of municipal corporations and the formation of their charters or the amendment of such charters and the making of changes in the form of city government.[16] Many other types of law, such as those providing for bridge construction or dispensing with county officers, which are not local option laws are also valid even though not effective until approved

L.R.A.(N.S.) 802; State v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; Re North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L.R.A. 638.

Annotation: 79 L. ed. 562; 35 L.R.A. (N.S.) 802; 104 Am. St. Rep. 391; 114 Am. St. Rep. 317–321; Ann. Cas. 1914C, 626; Ann. Cas. 1916A, 110; Ann. Cas. 1918E, 573.

[8] Davis v. State, 141 Ala. 84, 37 So. 454, 109 Am. St. Rep. 19; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L.R.A. 131.

Annotation: 6 A.L.R. 218; 79 L. ed. 572; 114 Am. St. Rep. 323.

Although a few cases hold that the operation of such statutes in particular districts cannot be made contingent upon the favorable vote of the electors thereof, it is generally held that where the statute is complete in itself, there is no unconstitutional delegation of power in making its operation dependent upon the vote or petition of the electors or freeholders of the district or upon the determination by a local court of the existence of the conditions prescribed in the statute. Annotation: 6 A.L.R. 218; 79 L. ed. 562.

See also ANIMALS, Vol. 2, p. 798, § 144.

A statute providing for the destruction of trees which are hosts to the cedar rust pest is not unconstitutional because its enforcement in any particular section of the state is left to the option of the residents of such section. Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

[9] Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; People v. Orange County, 81 Cal. 489, 22 P. 851, 15 Am. St. Rep. 66; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; State v. Cooke, 24 Minn. 247, 31 Am. Rep. 344; Paul v. Gloucester County, 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86; Bronson v. Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90; Hall v. Dunn, 52 Or. 475, 97 P. 811, 25 L.R.A.(N.S.) 193; Fouts v. Hood River, 46 Or. 492, 81 P. 370, 1 L.R.A.(N.S.) 483, 7 Ann. Cas. 1160.

Annotation: 79 L. ed. 569; 1 L.R.A.(N.S.) 483; 15 L.R.A.(N.S.) 942; 114 Am. St. Rep. 324; 1 Ann. Cas. 378; 14 Ann. Cas. 1001; Ann. Cas. 1918E, 874.

In some jurisdictions local option laws are held to be unconstitutional on the basis of invalid delegation of legislative authority. Annotation: 1 Ann. Cas. 374; Ann. Cas. 1918E, 877.

The legislature may enact a law providing that no permit to operate a saloon shall be effective until it has been ratified by the electors of the city. State ex rel. Wagner v. Summers, 33 S. D. 40, 144 N. W. 730, 50 L.R.A.(N.S.) 206, Ann. Cas. 1916B, 860.

See also INTOXICATING LIQUORS [Also 15 R. C. L. p. 319, §§ 81, 82].

[10] Henrico County v. Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001.

Annotation: 79 L. ed. 566; 114 Am. St. Rep. 319.

A statute making the right to establish a private industrial school in a county depend upon a vote of the electors of the county violates a constitutional provision that no laws, except such as relate to intoxicating liquors, bridges, public roads and buildings, fences, stock, common schools, paupers, and the regulation of local affairs of municipalities, shall be enacted to take effect upon the approval of any other authority than the general assembly. Columbia Trust Co. v. Lincoln Institute, 138 Ky. 804, 129 S. W. 113, 29 L.R.A.(N.S.) 53.

[11] Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056.

[12] Annotation: 79 L. ed. 575.

[13] Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056.

Annotation: 64 A.L.R. 1378, 1379.

[14] Datz v. Cleveland, 52 N. J. L. 188, 203, 19 A. 17, 20 A. 317, 7 L.R.A. 431.

[15] People ex rel. Graves v. McFadden, 81 Cal. 489, 22 P. 851, 15 Am. St. Rep. 66.

Annotation: Ann. Cas. 1914C, 626, 628.

In some jurisdictions the state Constitutions expressly provide that the question whether territory shall be detached from an existing county and formed into a new county must be submitted to a vote of the people of the proposed new county. Armstrong v. State, 29 Okla. 161, 116 P. 770, Ann. Cas. 1913A, 565. Annotation: Ann. Cas. 1914C, 626.

[16] Re Madera Irrig. Dist. Bonds, 92 Cal. 296, 341, 28 P. 272, 14 L.R.A. 755; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718 (commission or city manager plan); Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A.(N.S.) 534; Gretna v. Bailey, 141 La. 625, 75 So. 491, Ann. Cas. 1918E, 566; Bradshaw v. Lankford, 73 Md. 428, 21 A. 66, 11 L.R.A. 582, 25 Am. St. Rep. 602; People v. Butte, 4 Mont. 174, 1 P. 414, 47 Am. Rep. 346; State v. Tausick, 64 Wash. 69, 116 P. 651, 35 L.R.A.(N.S.) 802.

Annotation: 67 A.L.R. 742, 743; 79 L. ed. 555; 11 L.R.A. 582; 35 L.R.A.(N.S.) 802; 114 Am. St. Rep. 320, 321; Ann. Cas. 1915D, 105; Ann. Cas. 1918E, 573.

by the voters of a locality.[17] Following the same general rule, a law may also be made to take effect conditionally, depending upon the action of a municipal council[18] or even the action of the legislature of another state.[19]

In most jurisdictions statutes generally referring matters to the vote of all the people are treated as amounting to a delegation to them of legislative power and therefore unconstitutional.[20] This is the majority view in cases in which it was sought to leave the determination of the effectiveness of a statute to the people of the whole state, where the question was actually before the court.[1] In many other instances, although the question of approval by the people of the whole state was not raised by the statutes under litigation, the courts have indicated an approval of this view.[2] There are, however, cases which have expressly held that the legislature may, even in the absence of a constitutional provision for a referendum, leave to the determination of the people of the whole state whether or not a statute is to take effect.[3] There are also other cases in which the point, although not directly decided, is discussed in a way which would seem to favor the minority view.[4]

In some cases various distinctions have been made which prevent the operation of the general rule; such distinctions in some instances are due to the local state Constitution. Thus, statutes requiring the vote of subdivisions of the state have been held invalid as violating constitutional provisions that no law shall be enacted to take effect upon the approval of any other authority than the general assembly.[5] In other jurisdictions a distinction is made squarely between matters of general and those of local concern, and local

[17] Annotation: 20 Ann. Cas. 652; Ann. Cas. 1918E, 573.

[18] Wright v. Walcott, 238 Mass. 432, 131 N. E. 291, 18 A.L.R. 1242; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270.

[19] Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821.

[20] Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Opinions of Justices (Re Municipal Suffrage to Women), 160 Mass. 586, 36 N. E. 488, 23 L.R.A. 113; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506.
Annotation: 76 A.L.R. 1054; 23 L.R.A. 113; 20 Ann. Cas. 652.

[1] People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Opinion of Justices (Re Municipal Suffrage to Women), 160 Mass. 586, 36 N. E. 488, 23 L.R.A. 113; State ex rel. Childs v. Copeland, 66 Minn. 315, 69 N. W. 27, 34 L.R.A. 777; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Ex parte Farnsworth, 61 Tex. Crim. Rep. 342, 135 S. W. 535, 33 L.R.A.(N.S.) 968.
Annotation: 76 A.L.R. 1054; 79 L. ed. 560.

[2] Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; State v. Weir, 33 Iowa, 134, 11 Am. Rep. 115; Bradshaw v. Lankford, 73 Md. 428, 21 A. 66, 11 L.R.A. 582, 25 Am. St. Rep. 602; State v. Field, 17 Mo. 529, 59 Am. Dec. 275; People ex rel. Unger v. Kennedy, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914C, 616; Fouts v. Hood River, 46 Or. 492, 81 P. 370, 1 L.R.A.(N.S.) 483, 7 Ann. Cas. 1160; Parker v. Com. 6 Pa. 507, 47 Am. Dec. 480.
Annotation: 76 A.L.R. 1054.

[3] Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.
Annotation: 76 A.L.R. 1058.
A statute which provides that it shall become operative providing that those voting for its adoption in a state-wide referendum at the election for members of the general assembly in that year shall be a majority of all those voting on the question of the adoption or rejection of that statute is not unconstitutional as a delegation of legislative power to be exercised directly by the people, but is a valid example of a statute which may be made to take effect upon the happening of a contingency. Hudspeth v. Swayze, 85 N. J. L. 592, 89 A. 780, Ann. Cas. 1916A, 102.
By conferring the legislative power upon a senate and assembly, the people, by necessary implication, parted with authority to legislate directly, though they did not so part with the authority to determine, by legislative permission, whether a law enacted in the constitutional way shall be put into operation. State ex rel. Mueller v. Thompson, 149 Wis. 488, 138 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C, 774.

[4] Gordon v. State, 46 Ohio St. 607, 23 S. E. 63, 6 L.R.A. 749.
Annotation: 76 A.L.R. 1058.

[5] Columbia Trust Co. v. Lincoln Institute, 138 Ky. 804, 129 S. W. 113, 29 L.R.A.(N.S.) 53.

but not general laws may be enacted subject to the approval of voters of a particular portion of the state.[6]

b. Miscellaneous Attempts to Delegate Legislative Power

§ 217. Congress to the States.—The rule is well settled that Congress cannot delegate or transfer its legislative power to the states.[7] It cannot by delegation enlarge the powers of the states, although it may provide for state regulation by divesting articles of their interstate character at an earlier time than would otherwise be the case.[8] Thus, the act of Congress known as the Wilson Bill, making intoxicating liquors imported in original packages subject to the laws of any state into which they are carried, is not an unconstitutional delegation of power, since it simply declares when such property shall become subject to state laws and does not give any power to the states to legislate upon that subject.[9] For similar reasons the Webb-Kenyon Act, which prohibits the transportation from one state to another of intoxicating liquor which is intended to be received, possessed, sold, or used in violation of the law of the latter state, is not unconstitutional as an attempt to confer on the state legislature the power to regulate commerce.[10] Recently the Supreme Court has also decided that a statute declaring that prison-made goods transported into any state or territory and remaining therein for use, consumption, sale, or storage shall, upon arrival and delivery, be subject to the operation and effect of the laws of such state or territory to the same extent and in the same manner as though there produced, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise, does not unconstitutionally delegate congressional power to the states.[11] The administrative features of the Selective Draft did not render the act void as a delegation of Federal power to state officials.[12]

Many other omissions or commissions of Congress have been unsuccessfully attacked on this ground. Thus, as respects a subject matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress may exclude the states, Congress may withhold the exercise of its paramount power and leave the states free to act.[13] Moreover, supplementary regulations concerning the location of mining claims, prescribed by a state in addition to the congressional regulations, are not invalid on the theory that they were enacted in the exercise of an unlawful delegation by Congress of legislative power.[14]

[6] Bradshaw v. Lankford, 73 Md. 428, 21 A. 66, 11 L.R.A. 582, 25 Am. St. Rep. 602; Opinion of Justices (Re Municipal Suffrage to Women), 160 Mass. 586, 36 N. E. 488, 23 L.R.A. 113.
Annotation: 11 L.R.A. 582.

[7] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. ed. 834, 40 S. Ct. 438, 11 A.L.R. 1145; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Van Allen v. Assessors (Churchill v. Utica) 3 Wall (U. S.) 573, 18 L. ed. 229.
Annotation: 79 L. ed. 508.

[8] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865.
Annotation: 79 L. ed. 508.

[9] Re Van Vliet (C. C.) 43 F. 761, 10 L.R.A. 451; Re Spickler (C. C.) 43 F. 653, 10 L.R.A. 446.

[10] West Virginia v. Adams Exp. Co. (C. C. A. 4th) 219 F. 794, L.R.A.1916C, 291; Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A.1916C, 278.
Annotation: 79 L. ed. 509; L.R.A.1916C, 299, 307; L.R.A.1917B, 1229; L.R.A.1918B, 455, 461.

[11] Whitfield v. Ohio, 297 U. S. 431, 80 L. ed. 778, 56 S. Ct. 532.

[12] Kramer v. United States, 245 U. S. 478, 62 L. ed. 413, 38 S. Ct. 168; Jones v. Perkins, 245 U. S. 390, 62 L. ed. 358, 38 S. Ct. 166; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L.R.A.1918C, 361, Ann. Cas. 1918B, 856.
Annotation: 79 L. ed. 509; 7 B. R. C. 600.

[13] Van Allen v. Assessors (Churchill v. Utica) 3 Wall. (U. S.) 573, 18 L. ed. 229.
Annotation: 79 L. ed. 508.

[14] Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 S. Ct. 211.
Annotation: 79 L. ed. 508.

The employment of state laws and proceedings in the Federal courts is not invalid as a congressional delegation of authority to the states.[15] Congress may adopt later state legislation as respects actions for injuries occurring within territory under its jurisdiction within the boundaries of the state. The same rule applies to a statute permitting Federal courts to adopt by rules operating prospectively the provisions of state statutes touching proceedings to subject property of judgment debtors to the satisfaction of a judgment,[16] to the recognition of the local law by the Bankruptcy Act in the matter of exemptions, dower, priority of payments, and the like,[18] and to an act adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated "now provide" for a like offense.[19] Although a power of eminent domain purely Federal in its nature may not be delegated by Congress to a state, the ascertainment of the amount of compensation to be paid for property appropriated in Federal proceedings may be reckoned in accordance with the law of the state in which the property happens to be situated without an invalid delegation of congressional authority.[20] Variations in extent and incidence of Federal taxes, caused by differences in state laws, do not render such taxes invalid as involving a delegation of the Federal taxing power to the state legislatures,[1] and no improper delegation of the Federal taxing power to a state legislature is made by a provision that the liability "at law or in equity" of the transferee of property of a taxpayer for unpaid income or profit taxes may be enforced by summary administrative proceedings.[2]

§ 218. Congress to Territorial Legislatures or Commissions.—In dealing with a territory which is not a state, such as the Philippine Islands, Congress may delegate legislative authority to such agencies as it may select.[3] Congress may, undoubtedly, in respect to any designated district or territory which is not a state, delegate its general powers of legislation on subjects affecting the whole people. Such territory is within absolute congressional control; therefore, Congress may create a local legislative body and invest it with legislative powers.[4] Thus, the delegation by Congress to a commission appointed by the President of the power to legislate for the Philippine Islands has been held valid.[5]

§ 219. State Legislatures to Congress.—The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States.[6] Hence, a

15 Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. ed. 145; Bank of United States v. Halstead, 10 Wheat. (U. S.) 51, 6 L. ed. 264.
Annotation: 79 L. ed. 507.

16 Murray v. Joe Gerrick & Co. 291 U. S. 315, 78 L. ed. 821, 54 S. Ct. 432, 92 A.L.R. 1259.

17 Capital Co. v. Fox (C. C. A. 2d) 85 F. (2d) 97, 106 A.L.R. 376, writ of certiorari denied in 298 U. S. 672, 80 L. ed. 1394, 56 S. Ct. 937.

18 Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 S. Ct. 857.
Annotation: 79 L. ed. 508.

19 Franklin v. United States, 216 U. S. 559, 54 L. ed. 615, 30 S. Ct. 434.
Annotation: 79 L. ed. 508.

20 United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 S. Ct. 346.

1 Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 75 L. ed. 1289, 51 S. Ct. 608.
Annotation: 79 L. ed. 508.

2 Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 75 L. ed. 1289, 51 S. Ct. 608.

3 United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742, 11 Ann. Cas. 688.
Annotation: 79 L. ed. 494.

4 McCornick v. Western U. Teleg. Co. (C. C. A. 8th) 79 F. 449, 38 L.R.A. 684.
Annotation: 79 L. ed. 495.

5 Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 S. Ct. 808, 1 Ann. Cas. 697 (libel law).
Annotation: 79 L. ed. 495.

6 Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

state act appropriating a fund to be expended under the terms and conditions of an act of Congress to be passed in the future is unconstitutional.[7]

A state legislature does not invalidly delegate its legislative authority by adopting the law or rule of Congress, if such law is already in existence or operative.[8] For this reason a state income tax law which adopts as a basis of arriving at the net taxable income of a taxpayer the features of a similar Federal law does not vest in Congress and Federal bureaus the legislative power of the state in violation of the state Constitution.[9] On the other hand, a state statute adopting as a part of it the definition of intoxicating liquor to be found in a Federal statute to be subsequently enacted is an unconstitutional attempt to delegate legislative power.[10]

§ 220. State Legislatures to Other State Legislatures; Reciprocity or Retaliatory Statutes.—The so-called retaliatory or reciprocity statutes—a typical example of which is a state statute imposing upon foreign corporations the same taxes, fees, and penalties as are imposed by the home state of the corporation upon corporations of the taxing state—have been subjected to attack on the ground that they invalidly delegate legislative authority to the other state or its legislature.[11] In most jurisdictions such retaliatory legislation has been sustained and held not to be an improper delegation of legislative authority.[12] Similarly, no invalid delegation is involved in making an exemption of foreign motor vehicles, provided a similar exemption is accorded to vehicles of the enacting state by the state in which the foreign-owned vehicles are registered, such exemption to be contingent upon the making of an agreement for such reciprocal exemption between the local secretary of state and the proper officer of the other state.[13] In at least one jurisdiction, however, a contrary view has been taken and retaliatory legislation imposing on foreign insurance companies desiring to do business in the state the same requirements that are imposed by the state of their organization on insurance companies organized under the laws of the enacting state is regarded as invalid because it delegates the legislative power of the state to legislatures of other states.[14]

§ 221. Legislatures to Individuals.—From a variety of circumstances involving the same basic principle discussed in the foregoing section, the rule has become fixed that the legislature may not delegate legislative functions to private persons.[15] It has generally been held that statutes which leave the fixing of boundaries to the determination of private individuals, by petition or similar method of ascertaining the will of a certain number of the inhabitants of a district, are invalid as an improper delegation of legislative authority to private individuals. This result has been reached in cases dealing with school,[16] drainage, water, and highway districts.[17] Moreover, the legislature

7 Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.
Annotation: 100 A.L.R. 698.

8 Annotation: 79 L. ed. 502.

9 Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58, 70 A.L.R. 449.
Annotation: 79 L. ed. 503.

10 State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.
Annotation: 79 L. ed. 504.

11 Annotation: 79 L. ed. 504.

12 People v. Fire Asso. of Phila. 92 N. Y. 311, 44 Am. Rep. 380, affirmed in 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108.
Annotation: 91 A.L.R. 799; 79 L. ed. 504.

13 Interstate Trucking Co. v. Dammann, 208 Wis. 116, 241 N. W. 625, 82 A.L.R. 1080.
Annotation: 82 A.L.R. 1093.

14 State v. Firemen's Fund Ins. Co. 223 Ala. 134, 134 So. 858, 77 A.L.R. 1486.
Annotation: 91 A.L.R. 798, 801; 79 L. ed. 506.

15 Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056; State v. Bass, 171 N. C. 780, 87 S. E. 972, L.R.A.1916D, 583.

16 Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056.
Annotation: 70 A.L.R. 1062.

17 Annotation: 70 A.L.R. 1064.
A statute providing that whenever per-

cannot delegate to private persons and private associations of persons the power to make obligatory rules concerning the management and care of property or provide that the breach of such rules shall be a penal offense.[18] Other cases most analogous appear to be those involving statutes forbidding the erection of certain buildings without first obtaining the consent of persons owning property or living in the locality of the proposed site. Most of the cases hold the attempted delegation unconstitutional,[19] although, on the contrary, there is some scant authority in which such ordinances have been upheld.[20] A statute enabling the owner of adjoining land, where a right of way has been given to a railroad company, to require the company to build a fence on each side of the right of way at its own cost, thus leaving it with him not only to enforce the requirement of a fence, but to determine its necessity, is unconstitutional.[1] A statute which sets up a compulsory code of regulation in an industry upon the adoption by a majority of those engaged therein, thrusting the terms thereof upon an unwilling minority, is an invalid delegation of legislative authority to private individuals.[2] Attempted delegation of powers to private persons may be repugnant to the due process clause where it permits an arbitrary exercise of powers by such individuals and therefore violates the constitutional requirement of reasonableness.[3]

On the other hand, there are many cases where legislative authority has been held not to be delegated improperly to individuals by the statute under attack. A provision in a statute for the maintenance of washhouses by coal miners only upon petition of their employees is not an unconstitutional delegation of legislative power.[4] Giving to the residents of a district in a munici-

sons desiring to remove any tract of land from the corporate limits of a city shall petition for such removal, it shall be made, provided that after published notice the district court shall find that no public or private right will be injured or endangered, all considerations as to any right of the city or its creditors to look to the property for taxes being excluded is unconstitutional in that it attempts to confer a legislative power upon such petitioners. Hutchinson v. Leimbach, 68 Kan. 37, 74 P. 598, 63 L.R.A. 630, 104 Am. St. Rep. 384.

Occasionally, statutes have been upheld on such grounds as that the final determination of the matter, under the procedure involved, would lie with the courts, that certain conditions would have to be found by proper authorities under adequate standards, or that a proper discretion was conferred upon administrative officials, in addition to any partial determination by individuals or groups of individuals. Annotation: 70 A.L.R. 1064, 1065.

[18] State v. Crawford, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880 (requiring theater electrical wiring to conform to "National Electric Code").

The legislation involved in the case of State v. Crawford, supra, was so comprehensive as not only to require a conformance with the code of the association, as it existed at the time the statute was enacted, but to require a compliance with any future changes which the association might see fit to make. This was clearly a delegation of a legislative function. Undoubtedly, the legislature might have used the code in determining what regulations should be adopted and might, after an examination of the code, have incorporated its existing provisions in the statute as a part thereof, not as a code of the association, but as the legislature's own act and determination of what the regulations should be. Annotation: 2 A.L.R. 882; 79 L. ed. 499.

[19] Annotation: 2 A.L.R. 882, 883; 43 A.L.R. 834, s. 46 A.L.R. 88; 79 L. ed. 535; 20 L.R.A. 721.

For detailed discussion, see BUILDINGS, Vol. 9, p. 201, § 5.

[20] Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L.R.A. 84, 53 Am. St. Rep. 325. Annotation: 79 L. ed. 534.

[1] Owensboro & N. R. Co. v. Todd, 91 Ky. 175, 15 S. W. 56, 11 L.R.A. 285. Annotation: 79 L. ed. 500.

[2] Carter v. Carter Coal Co. 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

[3] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654.

For similar rule forbidding delegation of authority to administrative officers which results in arbitrary action, see infra, § 234.

[4] Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617.

Annotation: 27 A.L.R. 927; 79 L. ed. 500.

It has been held that making a statute requiring employers to furnish washrooms for their employees depend upon a vote of a specified percentage of the employees violates a constitutional provision that no law shall be enacted to take effect upon the approval of any authority other than the general assembly. Com. v. Beaver Dam Coal Co. 194 Ky. 34, 237 S. W. 1086, 27

pality power to initiate by petition a project to restrict the use of the property therein to residential purposes has been held not to delegate to them legislative power unconstitutionally,[5] for such a provision will be held to be permissive merely.[6] Nor is legislative power unconstitutionally delegated by a statute which permits sellers of commodities bearing the trademark, brand, or name of the producer or owner to contract with the purchaser for the maintenance of a fixed resale price, and provides that violations shall be unfair competition and actionable at the suit of any person damaged thereby.[7] Such a statute is not an unlawful delegation of power to private persons to control the disposition of the property of others, because the restriction, already imposed with the knowledge of the prospective reseller, runs with the acquisition of the purchased property and conditions it.[8] Furthermore, it is complete and in no manner dependent upon approval or disapproval by any person or group of persons.[9]

In other cases, due to the type of right involved or the particular wording of the state Constitution, statutes have survived assault on this ground.[10] Thus, no invalid delegation of legislative power is effected by a provision for the determination by a committee of a political party of the number of candidates for office to be nominated at the primary by the party, because the right involved is not a legislative matter, but is a political right of the party which is a voluntary organization with inherent powers of self-government. No power is conferred on a political party to make nominations, and the primary laws are merely a regulation of the exercise of the power to nominate which already exists in the party.[11] On the basis of the wording of the Constitution, a statute requiring the property of counties and school districts to be insured in a state insurance fund administered by the state auditor does not violate a constitutional provision that the legislature shall not delegate "to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, . . . or to levy taxes, or to perform any municipal functions whatever," any power thereby delegated being not to any special commission but to regularly elected or appointed state officials.[12]

§ 222. Legislatures to Private Corporations.—Occasionally, statutes are enacted requiring obedience to rules established by private corporations or prohibiting persons from doing particular things, except those persons who may be designated as their agents by such corporations. The question may arise as to whether this constitutes an unlawful delegation of power to such corporations to make and establish crimes or to exercise legislative power. While it is not disputed that it is not within the province of the legislature to delegate to private corporations the power to make laws for the creation of crimes or the

A.L.R. 920 (partially distinguishing and partially disagreeing with Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617). Annotation: 27 A.L.R. 927; 79 L. ed. 501.

[5] Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 185 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

[6] Ibid.

[7] Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435.

[8] Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476.

[9] Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435.

[10] See infra, notes 11, 12, this section.

[11] People ex rel. Lindstrand v. Emmerson, 333 Ill. 606, 165 N. E. 217, 62 A.L.R. 912. Annotation: 62 A.L.R. 924.

[12] State ex rel. Missoula v. Holmes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581.

discharge of offenders,[13] statutes such as those empowering railroad companies to appoint their ticket agents and forbidding all other persons to sell their tickets under penalty are not generally regarded as giving to them power to create crimes or as constituting an unlawful delegation of legislative authority.[14] On this point, however, there is authority to the effect that a statute so providing is unconstitutional, for the reason that it is said to give to a private corporation the option to create an offense and that, moreover, it is an invalid delegation of the authority of the legislature.[15] It has been stated that the legislature may delegate to an officer or corporation the right to determine the necessity of the exercise of the power of eminent domain.[16] Furthermore, a measure calculated to produce benefits to the public has been held to be valid although it is to be effected through the instrumentality of a private corporation.[17]

c. Delegation of Legislative Authority to Political Subdivisions

§ 223. Generally.—It is a well-settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of powers to govern matters which are local in scope. For a great variety of purposes and governmental functions the legislature may delegate a part of its power over local subjects to municipal corporations, county boards, and other public bodies within the legislative classification of departments.[18] In addition to the most frequent exercise of this power, in the case of municipalities,[19] this principle has been employed to sustain a delegation of powers ordinarily exercisable only by the legislature to such subdivisions as township committees,[20] park commissioners,[1] school districts,[2] and counties or county boards.[3] In some instances, however, the provisions of the state Constitution either forbid the delegation of power to certain boards or permit the exercise of such powers only by specified subdivisions. For example, a board of park commissioners to be appointed by the governor is not a corporate authority of a municipal corporation within the meaning of a constitu-

[13] Senate of Happy Home Clubs v. Alpena County, 99 Mich. 117, 57 N. E. 1101, 23 L.R.A. 144.

[14] Whaley v. State, 168 Ala. 152, 52 So. 941, 30 L.R.A.(N.S.) 499; Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; Ex parte O'Neill, 41 Wash. 174, 83 P. 104, 3 L.R.A.(N.S.) 558, 6 Ann. Cas. 869.
Annotation: 79 L. ed. 496.

[15] Jannin v. State, 42 Tex. Crim. Rep. 631, 51 S. W. 1126, 62 S. W. 419, 53 L.R.A. 349, 96 Am. St. Rep. 821.
Annotation: 79 L. ed. 498 (criticizing this view); 30 L.R.A.(N.S.) 500.

[16] State ex rel. Baltzell v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L.R.A. 394.
Contra.—Clendaniel v. Conrad, 3 Boyce (Del.) 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

[17] Wilson v. Black Bird Creek Marsh Co. 2 Pet. (U. S.) 245, 7 L. ed. 412.

[18] Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Chicago R. Co. v. Commerce Commission, 336 Ill. 51, 167 N. E. 840, 67 A.L.R. 938; Zoercher v. Agler, 202 Ind. 214, 172 N. E. 186, 70 A.L.R. 1232; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257.
Annotation: 79 L. ed. 492.
For detailed discussion of the powers which may be exercised by political subdivisions, see the specific title involved.

[19] See infra, § 224.

[20] State v. Corker, 67 N. J. L. 596, 52 A. 362, 60 L.R.A. 564.

[1] Vallelly v. Park Comrs. 16 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61 (denying, however, the right to tax).

[2] Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524, 8 Ann. Cas. 529.

[3] Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; Territory ex rel. Oahu County v. Whitney, 17 Haw. 174, 7 Ann. Cas. 737; Marion County v. Jewett, 184 Ind. 63, 110 N. E. 553, citing R. C. L. (county board); Wright v. May, 127 Minn. 150, 149 N. W. 9, L.R.A.1915B, 151; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; State, Paul, Prosecutor, v. Judge of Circuit Ct. 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.
Annotation: 7 Ann. Cas. 743.

tional provision that the legislature shall not levy taxes upon the inhabitants or property in the city or town for municipal purposes, but may vest in the corporate authorities thereof the power to assess and collect such taxes.[4] Moreover, the legislature cannot delegate to a levee district the legislative power to levy a tax under a constitutional provision authorizing it to delegate such power to counties and incorporated towns, since this impliedly excludes delegation to any other agency.[5]

§ 224. To Municipal Corporations.—The constitutional maxim which prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation as to matters purely of local concern of which the parties immediately interested are supposed to be better judges than the legislature.[6] The view

[4] State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A.(N.S.) 1078, Ann. Cas. 1912A, 1063.

[5] Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L.R.A. 725.

[6] **United States.** — Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 S. Ct. 50; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 S. Ct. 256; United States v. New Orleans, 98 U. S. 381, 25 L. ed. 225.
Alabama. — Lindsay v. Anniston, 104 Ala. 257, 16 So. 545, 27 L.R.A. 436, 53 Am. St. Rep. 44; Boyd v. Selma, 96 Ala. 144, 11 So. 393, 16 L.R.A. 729.
Arkansas. — Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679, 58 L.R.A. 921, 91 Am. St. Rep. 100.
California. — Re Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.(N.S.) 1092, 11 Ann. Cas. 911; Re Flaherty, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529.
Delaware. — Clendaniel v. Conrad, 3 Boyce, 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.
Florida. — Anderson v. Ocala, 67 Fla. 204, 64 So. 775, 52 L.R.A.(N.S.) 287; Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913, Ann. Cas. 1915D, 99; Munn v. Finger, 66 Fla. 572, 64 So. 271, 51 L.R.A.(N.S.) 631.
Hawaii.—Territory ex rel. Oahu County v. Whitney, 17 Haw. 174, 7 Ann. Cas. 737.
Illinois. — People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Springfield Gas & E. Co. v. Springfield, 292 Ill. 236, 126 N. E. 739, 18 A.L.R. 929, affirmed in 257 U. S. 66, 66 L. ed. 131, 42 S. Ct. 24; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L.R.A. 631; People ex rel. Jackson v. Suburban R. Co. 178 Ill. 594, 53 N. E. 349, 49 L.R.A. 650; Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L.R.A. 84, 53 Am. St. Rep. 325; Carrollton v. Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L.R.A. 522; Davis v. Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L.R.A. 563.
Indiana. — Logansport v. Public Serv. Commission, 202 Ind. 523, 177 N. E. 249, 76 A.L.R. 838; Sarlls v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Grand Trunk W. R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L.R.A.(N.S.) 850, reversed on other grounds in 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A. (N.S.) 405; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 747, 85 N. E. 362, 20 L.R.A.(N.S.) 461.
Iowa. — Ross v. Wright County, 128 Iowa, 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L.R.A. 285, 64 Am. St. Rep. 157; Ottumwa v. Zekind, 95 Iowa, 622, 64 N. W. 646, 29 L.R.A. 734, 58 Am. St. Rep. 447.
Kansas. — Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A.(N.S.) 534.
Maine. — Hayford v. Bangor, 102 Me. 340, 66 A. 731, 11 L.R.A.(N.S.) 940.
Massachusetts. — Com. v. Maletsky, 203 Mass. 241, 89 N. E. 245, 24 L.R.A.(N.S.) 1168; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, affirmed in 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L.R.A. 142, 12 Am. St. Rep. 566.
Michigan. — People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L.R.A. 751.
Minnesota. — State ex rel. Simpson v. Mankato, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.(N.S.) 111.
Mississippi.—Jackson v. State, 102 Miss. 663, 59 So. 873, Ann. Cas. 1915A, 1213.
Nebraska. — Western U. Teleg. Co. v. Fremont, 39 Neb. 692, 43 Neb. 499, 58 N. W. 415, 61 N. W. 724, 26 L.R.A. 698.
New York. — New York Steam Corp. v. New York, 268 N. Y. 137, 197 N. E. 172, 99 A.L.R. 1157; Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918E, 574.
North Dakota.—Vallelly v. Park Comrs. 16 N. D. 25, 111 N. W. 615, 15 L.R.A.(N.S.) 61.
Ohio. — Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; State ex rel. Atty. Gen. v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L.R.A. 729.
Oklahoma. — Re Jones, 4 Okla. Crim. Rep. 74, 104 P. 570, 31 L.R.A.(N.S.) 548, 140 Am. St. Rep. 655.
Oregon. — Oregon & C. R. Co. v. Portland, 25 Or. 229, 35 P. 452, 22 L.R.A. 713.
South Dakota.—Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760.
Texas. — Green v. Amarillo (Tex. Civ. App.) 244 S. W. 241 (affirmed in (Tex. Com. App.) 267 S. W. 702), citing R. C. L.

generally adopted is that a grant of power to a municipal corporation to legislate by ordinance on enumerated subjects connected with its municipal affairs is in addition to the power of making bylaws, which is incidental to the creation of a corporation,[7] and that the legislature may actually delegate a portion of its power to a city government.[8] Ordinances passed under such delegated powers, if legally enacted, have the force of laws passed by the legislature.[9]

Both in the subjects embraced and in the specific instances of application the examples of municipal law by the exercise of delegated power are very numerous. Thus, it has been held that the legislature may constitutionally delegate to a municipality the power to punish by ordinance an act made punishable under state laws,[10] to impose license taxes on occupations,[11] to tax generally,[12] to exercise the right of eminent domain,[13] or to regulate utilities and the rates thereof.[14] The police power may also be delegated by the legislature to municipal corporations;[15] and when so delegated, the agency employed is clothed with power to act, as full and efficient as that possessed by the legislature itself.[16] Similarly, the legislature may delegate to a municipality its control over streets and highways.[17] Other miscellaneous powers

Virginia. — Miller v. Pulaski, 109 Va. 137, 63 S. E. 880, 22 L.R.A.(N.S.) 552.

Washington.—State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78; State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 P. 651, 35 L.R.A.(N.S.) 802.

West Virginia. — Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23, L.R.A.1918D, 931.

Wisconsin. — State ex rel. Rose v. Superior Ct. 105 Wis. 651, 81 N. W. 1046, 48 L.R.A. 819; Wisconsin Keely Institute Co. v. Milwaukee County, 95 Wis. 153, 70 N. W. 68, 36 L.R.A. 55, 60 Am. St. Rep. 105.

Annotation: 79 L. ed. 493, 494 et seq.

[7] Hart v. Scott, 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86.

[8] Theisen v. McDavid, 34 Fla. 440, 16 So. 321, 26 L.R.A. 234; Banta v. Chicago, 172 Ill. 204, 50 N. E. 233, 4 L.R.A. 611; Sarlis v. State, 201 Ind. 88, 166 N. E. 270, 67 A.L.R. 718; Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686.

[9] New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518, 17 S. Ct. 161; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

Annotation: 41 L. ed. 519.

[10] Theisen v. McDavid, 34 Fla. 440, 16 So. 321, 26 L.R.A. 234.

[11] Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 S. Ct. 318; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 S. Ct. 673; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Harder's Fire Proof Storage & Van Co. v. Chicago, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; Banta v. Chicago, 172 Ill. 204, 50 N. E. 233, 40 L.R.A. 611; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A. (N.S.) 686.

For detailed discussion see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 950, §§ 251 et seq.].

[12] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 943, §§ 242 et seq.].

[13] See EMINENT DOMAIN [Also 10 R. C. L. p. 195, § 167].

[14] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 860, § 162].

[15] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; State ex rel. Garrison v. Reeve, 104 Fla. 196, 139 So. 817, 79 A.L.R. 1119; Wyatt v. Rome, 105 Ga. 312, 31 S. E. 188, 42 L.R.A. 180, 70 Am. St. Rep. 41; Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819; Downs v. Swan, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586; Hartman v. May, 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; Hart v. Scott, 50 N. J. L. 585, 15 A. 272, 1 L.R.A. 86; State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L.R.A. 423, 28 Am. St. Rep. 715; Fylken v. Minot, 66 N. D. 251, 264 N. W. 728, 103 A.L.R. 320; Carty v. Winooski, 78 Vt. 104, 62 A. 45, 2 L.R.A. (N.S.) 95, 6 Ann. Cas. 436; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

For detailed treatment, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 799, §§ 107 et seq.].

[16] Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Yale University v. New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667; Pittsburgh. C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L.R.A.(N.S.) 461; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218.

[17] See HIGHWAYS, STREETS, AND SIDEWALKS [Also HIGHWAYS, 13 R. C. L. p. 165, § 144]

such as the regulation of municipal officers[18] and the adoption of the commission or city manager form of government,[19] have been held to be validly delegated to municipalities.

Notwithstanding the broad application of the principle that legislative power may be delegated, it has its limitations. Hence, it is held that delegation cannot be made of an exclusive power over a matter the control of which has been lawfully vested in, and not withdrawn from, another branch of the government.[20] Constitutional provisions may also directly affect the extent of permissible delegation. Thus, authority to enact penal ordinances affecting territory beyond their territorial limits and outside the boundaries of property owned by them cannot be delegated by the legislature to municipalities, where the Constitution provides that such corporations may make and enforce within their limits all police regulations not in conflict with general laws.[1] Moreover, the nature of the right involved may militate against the delegation. A right reserved to a general assembly to amend or repeal at its discretion an act authorizing the incorporation of a street railway company is a right reserved to the general assembly itself and probably cannot be delegated to the common council of a city.[2] Similarly, where the Constitution forbids irrevocable grants of special privileges or immunities, the legislature cannot make such a grant indirectly by giving power to a city to make it.[3]

In exercising the powers delegated or conferred by the legislature, the municipal corporation—or other local subdivision—is subject to the same general principles concerning the delegation of powers as control the legislature itself. Consequently, in exercising its power, a municipality is subject to the same restrictions upon delegation of legislative authority as rest upon the state legislature.[4]

d. DELEGATION TO, OR CONFERRING LEGISLATIVE POWER UPON, JUDICIARY

§ 225. Generally.—One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government[5] consists in the rule prohibiting the vesting of legislative power in the judiciary. The legislature cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature.[6] Well settled as is the general rule, there is a wide variance of conclusions in those cases in which it has been sought to be applied. Not only do the constitutional provisions vary as to the powers which may be imposed upon the courts or which may be delegated to them in the

[18] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 912, §§ 210 et seq.].

[19] See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 745, § 51].

[20] Malone v. Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002; Ex parte De Silvia, 88 Tex. Crim. Rep. 634, 229 S. W. 542, citing R. C. L.

[1] Brown v. Cle Flum, 145 Wash. 588, 261 P. 112, 55 A.L.R. 1175.

[2] City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 S. Ct. 653.

[3] Opelika v. Opelika Sewer Co. 265 U. S. 215, 68 L. ed. 985, 44 S. Ct. 517.

[4] Annotation: 79 L. ed. 494.
See generally MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 896, § 195].

[5] See supra, §§ 180 et seq.

[6] United States v. Todd, 13 How. (U. S.) 52, 14 L. ed. 47; Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; State ex rel. White v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222; Wicomico County v. Todd, 97 Md. 247, 54 A. 963, 62 L.R.A. 809, 99 Am. St. Rep. 438; Re Opinion of Justices, 279 Mass. 607, 180 N. E. 725, 81 A.L.R. 1059; Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 350, 12 A.L.R. 26; State v. Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Re Phillips, 82 Neb. 45, 116 N. W. 950, 17 L.R.A.(N.S.) 1001; Thompson v. Redington, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161; State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1; Langever v. Miller, 124 Tex. 80, 76 S. W. (2d) 1025, 96 A.L.R. 836; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 P. 405, 8 L.R.A. 106.

different states, but the courts themselves have taken inconsistent positions on the questions of what constitutes legislative power and what constitutes judicial function. Those cases dealing with laws attempting to vest in the courts a power of appointment graphically illustrate the diversity of views existent. It has usually been held that where a statute attempts to vest powers in the judiciary to appoint to office certain administrative or subordinate officers, or officers who assist in carrying out court functions, no invalid delegation of legislative authority to the judiciary has been made and there is no usurpation of legislative power by the court.[7] In other cases it has been held that statutes imposing the power of appointment on judges are invalid as attempting to impose upon the courts a nonjudicial function. These cases generally involved the attempted appointment of such officers as waterworks trustees, surveyors, and other officers whose duties were solely ministerial and not connected with the exercise of judicial functions.[8]

§ 226. Applications of Principles.—The general diversity of opinion as to what constitutes an unconstitutional delegation of legislative authority to the courts or an invalid imposition of nonjudicial function upon them[9] runs through the many fact situations which have arisen. It occurs in matters political in nature. If, under a state Constitution, the legislature has been invested with the authority to make investigations of election frauds, the authority cannot be validly delegated to the judiciary.[10] Where, however, the Constitution itself provides that the legislature shall determine by law before what authority and in what manner election contest cases shall be conducted, there is no improper delegation of authority to the courts, because the fundamental law specifically provides for the delegation of the power.[11] A statute conferring upon county courts the power to supervise elections and constituting the election commissioners, judges, and clerks officers of the court is not unconstitutional as attempting to confer on the court powers properly belonging to other branches of government.[12] It has also been determined that a statute which makes it an offense punishable by the courts for any person employed for pecuniary consideration to act as a legislative counsel or agent or to go upon the floor of either house of the legislature while in session except upon invitation of the house is not invalid as delegating to the courts the authority vested in the legislature to punish for contempt any person who tries to influence legislative voting by some corrupt means.[13] Moreover, a statute which requires a judicial determination in advance of a sale of a proposed municipal bond issue that the bonds are valid and within the limitation of the state Constitution as to municipal indebtedness is not invalid as an attempt to confer nonjudicial functions upon a court.[14] A special statute conferring upon a district judge of the United States the power to adjudicate upon a claim arising under the Treaty of 1819 with Spain does not make the

[7] State ex rel. Douglas v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. Rep. 571.
Annotation: 8 Ann. Cas. 599; 10 Ann. Cas. 436; 18 Ann. Cas. 1189.

[8] State ex rel. White v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L.R.A. 244, 93 Am. St. Rep. 222 (waterworks manager).
Annotation: 8 Ann. Cas. 601.

[9] See supra, § 225.

[10] Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.
Annotation: L.R.A.1917D, 1046, 1048.

[11] Thompson v. Redington, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918A, 1161; Ashford v. Goodwin, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913A, 699 (contested primary election).
Annotation: L.R.A.1917D, 1047.

[12] People ex rel. Rusch v. White, 334 Ill. 465, 166 N. E. 100, 64 A.L.R. 1006.

[13] Campbell v. Com. 229 Ky. 264, 17 S. W. (2d) 227, 63 A.L.R. 932.

[14] Rohde v. Newport, 246 Ky. 476, 55 S. W. (2d) 368, 87 A.L.R. 701.

proceeding a judicial one, although the act to be done is judicial in its nature.[15] The duties of securing private rights in lands within the territory ceded by Mexico to the United States and of fulfilling the obligations imposed by the United States by treaties belong to the political department of the government and may either be discharged by Congress itself or be delegated by it to a strictly judicial tribunal or to a board of commissioners.[16] An act empowering circuit courts to pass on pensions with an appeal to the War Department is invalid because the power conferred is not judicial power,[17] although adjudication by the courts of the rights of settlers under a Carey-Act project to repayment of an assessment wrongfully collected under direction of a state board is not an encroachment upon the province of the board, where the state law does not vest the board with power to adjudicate rights to repayment of money wrongfully collected.[18]

The question as to whether authority is constitutionally conferred upon the judiciary often arises when an attempt is made by the legislature to vest the judiciary with power to levy and assess taxes. In ordinary cases the courts with practical unanimity have declared that the levy and assessment of taxes are not judicial acts and that such functions may not be delegated to a court or judge.[19] Some judges of inferior courts, however, are not so exclusively judicial officers that such duties may not be required of them.[20] It has been held that inheritance taxes may be imposed and collected by the courts.[1] Some courts for this purpose have recognized a distinction between a tax and a special assessment, allowing the latter to be made by a court or its duly authorized appointees.[2]

Rate making has been held to be beyond the limits of permissible delegation to the judiciary.[3]

Conferring upon a court power to vacate plats and adjudge the title to streets, alleys, and public grounds to be in the persons entitled thereto does not contravene the Constitution.[4]

Various procedural legislation has raised a question as to the authority delegated to the judiciary. It has been held that a nonjudicial function is not imposed upon the court by a statute providing for the appointment of disin-

[15] United States v. Ferreira, 13 How. (U. S.) 40, 14 L. ed. 42.

[16] United States v. Baca, 184 U. S. 653, 46 L. ed. 733, 22 S. Ct. 541.

[17] Re Sanborn, 148 U. S. 222, 37 L. ed. 429, 13 S. Ct. 577; United States v. Todd, 13 How. (U. S.) 52, 14 L. ed. 47.
The result of the opinions expressed by the judges of the Supreme Court (1793, 1794) in the note to Hayburn's Case (2 Dall. (U. S.) 409, 1 L. ed. 436) and in the case of United States v. Todd, 13 How. (U. S.) 52, 14 L. ed. 47, is this: (1) That the power proposed to be conferred on the circuit courts of the United States by the Act of 1792 (regarding pension claims) was not judicial power within the meaning of the Constitution, and was therefore unconstitutional and could not be lawfully exercised by the courts; (2) that as the act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court, in the character of commissioners. Note by Taney, Ch. J., attached to United States v. Todd, supra.

[18] Twin Falls Salmon River Land & Water Co. v. Caldwell, 266 U. S. 85, 69 L. ed. 178, 45 S. Ct. 22.

[19] Hendrickson v. Creager, 245 U. S. 115, 62 L. ed. 185, 38 S. Ct. 46.
Annotation: 62 L. ed. 178.

[20] Annotation: 62 L. ed. 178.

[1] Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L.R.A.(N.S.) 121, 9 Ann. Cas. 711.
Annotation: 62 L. ed. 180.

[2] Annotation: 62 L. ed. 180, 181.

[3] State ex rel. Godard v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662, qualified in State ex rel. Court of Industrial Relations v. Howat, 107 Kan. 423, 191 P. 585 (writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277), citing R. C. L., which latter case states that the act creating the Kansas Court of Industrial Relations does not contain the basic deficiencies of the Court of Visitation Act held to be invalid in State ex rel. Godard v. Johnson, supra.
Cf. Re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L.R.A. 319.

[4] Re Hull, 163 Minn. 439, 204 N. W. 534, 205 N. W. 613, 49 A.L.R. 320, writ of error dismissed in 275 U. S. 491, 72 L. ed. 390, 48 S. Ct. 33.

terested qualified experts by the court whenever, in any criminal case, expert opinion evidence becomes necessary or desirable.[5] On the other hand, the review of rulings of the trial court in a criminal case by an appeal taken on behalf of the government after acquittal, on which the court has no power to set aside the verdict, involves a determination of moot questions only, which is not a judicial function and cannot be required of a Federal court by Congress.[6]

In many cases dealing with declaratory judgments, the question as to the validity of the power sought to be conferred upon the courts has been considered. It was held in an early case that a statute authorizing courts to make binding declarations of rights when no judicial controversy is involved confers upon the courts powers not judicial, requires the performance of acts nonjudicial in character, and is in conflict with the constitutional provision vesting judicial power in the courts.[7] A declaratory judgment statute, however, which explicitly states that it applies only to cases of actual controversies and that declarations of rights made thereunder shall have the effect of final judgments is not unconstitutional as not covering the exercise of judicial power.[8]

Power to regulate procedure is a judicial power or at least not purely or distinctively a legislative power.[9] The delegation by Congress to the Federal courts of power to make such alterations and additions as they may deem expedient in the regulations as to processes and proceedings therein is constitutional,[10] and the power to prescribe what property may be seized on execution may also be delegated by Congress to the Federal courts.[11] Similarly, a state statute under which the Supreme Court of the state adopts and promulgates rules of pleading, practice, and procedure for the trial courts is not unconstitutional as an attempt to delegate exclusive legislative powers to the judiciary.[12]

[5] Jessner v. State, 202 Wis. 184, 231 N. W. 634, 71 A.L.R. 1005.
Annotation: 71 A.L.R. 1017.

[6] United States v. Evans, 213 U. S. 297, 53 L. ed. 803, 29 S. Ct. 507.

[7] Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 350, 12 A.L.R. 26.
Annotation: 12 A.L.R. 57, 63, s. 19 A.L.R. 1124, 1125, 68 A.L.R. 113, 114, and 87 A.L.R. 1209, 1210.

[8] Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105.
Annotation: 12 A.L.R. 57, 63, 64, s. 19 A.L.R. 1125, 68 A.L.R. 113, 114 and 87 A.L.R. 1209, 1210.

A declaratory judgment statute limited to the adjudication of controversies in which the parties have a real interest is not unconstitutional as imposing upon the courts a nonjudicial function. Cryan's Estate, 301 Pa. 386, 152 A. 675, 71 A.L.R. 1417.
Annotation: 87 A.L.R. 1210.

The views of the majority of the courts sustaining the constitutionality of Declaratory Judgment Acts are confirmed by later holdings on the subject, including the holding of the Michigan Supreme Court in Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618, 68 A.L.R. 105, which makes the courts unanimous on the question, the holding of the Michigan court in Anway v. Grand Rapids R. Co. 211 Mich. 592, 179 N. W. 350, 12 A.L.R. 26, being in effect overruled, although the statute sustained in the Washington-Detroit Theatre Co. Case differs from that held unconstitutional in the Anway Case, in that jurisdiction is expressly limited to actual controversies. Annotation: 68 A.L.R. 113.

The Federal courts have rendered opinions adversely to the validity of Declaratory Judgment Acts, but it has recently been held that while ordinarily a case for judicial controversy results in a judgment requiring the award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 77 L. ed. 730, 53 S. Ct. 345, 87 A.L.R. 1191; Fidelity Nat. Bank & T. Co. v. Swope, 274 U. S. 123, 71 L. ed. 959, 47 S. Ct. 511 (approved in Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 73 L. ed. 918, 49 S. Ct. 499). Annotation: 87 A.L.R. 1210.

[9] State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1.
As to the rule-making power of the courts, see COURTS [Also 7 R. C. L. p. 1023, §§ 50 et seq.].

[10] Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 S. Ct. 340; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. ed. 145; Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.
Annotation: 110 A.L.R. 33; 79 L. ed. 501.

[11] Bank of United States v. Halstead, 10 Wheat. (U. S.) 51, 6 L. ed. 264.
Annotation: 79 L. ed. 501.

§ 227. Matters Relating to Boundaries or Political Districts.—According to the majority view, the creation, enlargement, or diminution of political districts or municipal corporations is a legislative function. A statute which delegates the performance of this function to the judiciary and leaves to the discretion of that body the determination of the circumstances which will justify the creation of a district or corporation or an enlargement or diminution of such a political subdivision violates the Constitution.[13] A minority of the cases do not seem to require such a strict enforcement of the general rule as is required by the majority and seem to hold that a strict enforcement of this rule is not only unnecessary, but impracticable.[14]

Under the majority view, a statute authorizing the creation of municipal corporations or modification of their boundaries by a court, upon petition of a majority of the inhabitants of the territory to be incorporated, is treated as unconstitutional as delegating legislative functions to the court.[15] Under the minority rule, however, a statute providing for the extension of the corporate limits of cities and towns, designating the circuit judges of the state in which the premises lie as the governmental agency for carrying out the provisions of the statute, and conferring upon them the power to determine the boundaries and the necessity for, and expediency of, extending such limits is not unconstitutional.[16]

Under one view of the law the power to create drainage districts is a legislative, not a judicial, function.[17] Other cases hold that drainage districts may be organized and assessments for benefits made by judicial proceedings.[18]

The constitutionality of levee and flood-control acts has been also sustained

[12] State v. Roy, 40 N. M. 397, 60 P. (2d) 646, 110 A.L.R. 1.
Annotation: 110 A.L.R. 33.

[13] Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; Jernigan v. Madisonville, 102 Ky. 313, 43 S. W. 448, 39 L.R.A. 214; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 P. 405, 8 L.R.A. 106; Re North Milwaukee, 93 Wis. 616, 67 N. W. 1003, 33 L.R.A. 638.
Annotation: 69 A.L.R. 267, 268.

This general proposition is supported both by the cases which hold the statute therein actually considered as valid as well as those which hold the statute under consideration invalid, and also by cases in which the statute, if its language were strictly construed, would delegate legislative discretion to the judiciary, but which has been so interpreted by the courts that its operation does not violate the constitutional limitation. Annotation: 69 A.L.R. 268.

[14] Forsyth v. Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L.R.A. 576; Hutchinson v. Leimbach, 68 Kan. 37, 74 P. 598, 63 L.R.A. 630, 104 Am. St. Rep. 384; Callen v. Junction City, 43 Kan. 627, 23 P. 652, 7 L.R.A. 736; Henrico County v. Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001.
Annotation: 69 A.L.R. 269.

The tendency of some of the later cases seems to be to return to the stricter rule.
Annotation: 69 A.L.R. 270.

[15] Territory ex rel. Kellogg v. Stewart, 1 Wash. 98, 23 P. 405, 8 L.R.A. 106; Re North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L.R.A. 638.
Annotation: 69 A.L.R. 270, 272–274 et seq.

[16] Henrico County v. Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001.
Annotation: 64 A.L.R. 1373 et seq.; 69 A.L.R. 273, 274 et seq.

On different reasoning it was once held that no unlawful delegation of legislative power to a judicial officer is made by a statute requiring the approval of a court of an ordinance extending the limits of a city under a general law of the state, since the determination of the question whether the statutory conditions have been complied with is a judicial matter. Callen v. Junction City, 43 Kan. 627, 23 P. 652, 7 L.R.A. 736.

The early Kansas cases while announcing general principles which accord with the majority rule are so liberal in application of it as to make the judgments therein announced vary greatly from the judgments announced in the majority of cases. Annotation: 69 A.L.R. 275.

Under the more recent decisions, the rule in Kansas would seem to have been changed so that it now conforms to the rule adopted by other jurisdictions. Annotation: 69 A.L.R. 277.

[17] Burnett v. Greene, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244.
Annotation: 69 A.L.R. 287.

[18] Annotation: 69 A.L.R. 285; 70 A.L.R. 1284; 62 L. ed. 181.

in various cases as against the objection that there has been an unlawful delegation of legislative power to the courts.[19]

The same conflict between majority and minority viewpoints as to whether the power conferred upon the judiciary is invalidly or validly delegated occurs in cases dealing with the organization or change of boundaries of school districts[20] and the creation of various highway, cattle, and utility power districts.[1]

Occasionally, the attack has been directed against such statutes dealing with the creation or alteration of political subdivisions on the ground that the power sought to be imposed upon the courts is not judicial. This is a different approach from that of the attack already considered, the basis of which is the theory, generally successfully contended, that the statutes invalidly delegate legislative authority. In a majority of the cases in which this question of imposition of power has received consideration, statutes providing for the formation or change of political districts and municipal corporations have been held not to violate the constitutional provision separating the powers of the government and not to impose on courts the exercise of nonjudicial functions or powers.[2] In a minority of the cases, however, it is held that a statute which imposes such powers on a court enjoins the exercise of a nonjudicial function in regard to the creation or change of political districts and municipal corporations and is unconstitutional.[3]

§ 228. Vesting Discretionary Power in Judiciary.—There are certain apparent exceptions to the general rule forbidding the delegation of legislative authority to the courts[4] in cases where discretion is conferred upon the courts. It is clear, however, that when the courts are said to exercise a discretion, it must be a mere legal discretion which is exercised in discerning the course prescribed by law and which, when discerned, it is the duty of the court to follow.[5] In such instances, the exercise of judicial discretion by the courts is not an attempt to use legislative power or to prescribe and create a law, but is an instance of the administration of justice and the application of existing laws to the facts of particular cases. Thus, the principle as to the separation of powers of government is not transgressed by vesting in the courts discretion as to the granting of licenses[6] or the length of sentence or amount of fine between designated limits in sentencing persons convicted of crime,[7] or by conferring on them the general right to determine whether the facts in a given case fall within or without the provisions of a statute.[8]

[19] Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.
Annotation: 70 A.L.R. 1284, 1285.

[20] Annotation: 69 A.L.R. 288.

[1] Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257.
Annotation: 69 A.L.R. 289, 290.

[2] State ex rel. Richards v. Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L.R.A. 737.
Annotation: 69 A.L.R. 290.

[3] Burnett v. Green, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 P. 405, 8 L.R.A. 106.
Annotation: 69 A.L.R. 294, 295.

[4] See supra, § 225.

[5] Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Hubbard v. Hubbard, 77 Vt. 73, 58 A. 969, 67 L.R.A. 969, 107 Am. St. Rep. 749, 2 Ann. Cas. 315; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L.R.A. 145, 35 Am. St. Rep. 27.
Annotation: 79 L. ed. 501.

[6] McCrea v. Roberts, 89 Md. 238, 43 A. 39, 44 L.R.A. 485.

[7] Ohio v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 S. Ct. 703; State v. Creamery Package Mfg. Co. 115 Minn. 207, 132 N. W. 268, L.R.A.1915A, 892, Ann. Cas. 1912D, 820.

[8] Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 31 S. Ct. 502, 34 L.R.A.(N.S.) 834, Ann. Cas. 1912D, 734; State ex rel. Young v. Duval County, 76 Fla. 180, 79 So. 692, citing R. C. L.; Re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855; Cass County v. Nixon, 35 N. D. 601, 161 N. W. 204, L.R.A.1917C, 897. See also Porter v. Investors Syndicate, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132.

The legislature cannot lawfully transfer to the judiciary the power to exercise a discretion to determine in the first instance whether a statute ought or ought not to be given an operative effect in any given case logically within its legitimate scope and intendment,[9] because a court cannot be vested with discretion to determine whether a precedent law shall or shall not go into effect in particular cases.[10]

e. Laws Effective on Proclamation of Chief Executive

§ 229. Generally.—In view of the right of the legislature to pass statutes to take effect upon the happening of contingencies,[11] Congress may leave to the President the power of determining the exigency upon the happening of which a certain act shall take effect.[12] Furthermore, Congress may make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of certain facts, such as that the edicts of certain nations have been so revoked or modified that they do not violate the neutral commerce of the United States.[13] Likewise, state laws may be enacted with the provision that they shall take effect upon the governor's proclamation. Thus, the authorizing of the governor to issue a proclamation against bringing sheep into the state from districts in which he has reason to believe infectious disease of sheep has become epidemic does not delegate to him legislative power.[14] It has also been held that delegation of legislative power may properly be made to a mayor by ordinance, as where that officer, on apprehending that there is danger of the spread of hydrophobia within or near a city, may issue a proclamation requiring under penalty all persons possessing dogs to confine or securely muzzle them for a given period.[15]

f. Delegation of Power to Suspend Laws

§ 230. Generally.—The rule is well established that the legislature cannot authorize the suspension of a law by another agency even in cases where it has the power to suspend the law.[16] Hence, in a few cases the vesting of discre-

The legislature, having declared its policy and determined the facts and conditions which must form the basis for the organization, incorporation, powers, and government of an electric light, heat, and power district, or other public body, may vest authority in the courts to determine whether the law has been complied with, as a condition upon which such organization shall come into being. In such case the court does not adjudicate upon the necessity or political propriety of forming the corporation, and hence does not exercise any political function. Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A.L.R. 257.

[9] Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

[10] Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821.

A statute has been held to be unconstitutional which attempted to authorize a judge to whom application was made to order a judicial inquiry, if in his opinion the interests of public justice so required, to ascertain whether a candidate for the United States Senate in person or by agents expended, to secure his election, money or other things of value in excess of the amount allowed by law. Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A. 1917D, 1040.

[11] See supra, § 216.

[12] The Aurora v. United States, 7 Cranch (U. S.) 382, 3 L. ed. 378; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616.

[13] Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; The Aurora v. United States, 7 Cranch (U. S.) 382, 3 L. ed. 378.
As to the delegation of powers by Congress to the President in matters relating solely to external or international affairs, see infra, § 239.

[14] State v. Rasmussen, 7 Idaho, 1, 59 P. 933, 52 L.R.A. 78, 97 Am. St. Rep. 234.
See also Animals, Vol. 2, p. 809, § 159.

[15] Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749.
See Animals, Vol. 2, p. 799, § 146.

[16] Montgomery v. State, 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826.

A statute which contains a clause authorizing a county court at its pleasure to suspend the operation of the act after it takes effect is unconstitutional and void

tion in a judicial officer has been held to amount to an unconstitutional grant to him of the power to suspend laws. For example, it has been held that an act attempting to change the practice in a certain class of criminal trials, so as to give the judge discretion to allow the jury to disperse and not be placed in charge of an officer, is unconstitutional because it attempts to confer upon each judge the power to suspend the general law, making his discretion the only rule for his conduct.[17]

In several of the Constitutions of the states there are inserted provisions that the power of suspending laws shall not be exercised except by the legislature[18] or by its authority.[19] Such a provision, however, does not confer absolute power of suspension upon the legislature. Thus, it is powerless to suspend a statute as it applies to particular individuals by name. It has been said in this connection that it is manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our Constitution and laws that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances or that anyone should be subject to losses, liability for damages, suits, or actions from which all others under like circumstances are exempted.[20]

In some jurisdictions a further limitation is recognized to the effect that the legislature cannot suspend laws with respect to particular portions only of the state, but that the suspension must be general. While recognizing the force of these principles, they have not as a rule been allowed to prevent the submission of local option laws to the vote of the people. This is especially true where the Constitution authorizes a delegation of legislative power for local purposes and no objection is made to the legislature's enacting laws which in effect permit the voters of a subdivision of the state to suspend the general law in particular localities.[1]

§ 231. Suspension of Laws by Executive Officers.—Since the whole legislative power is assigned to the legislative department of the government, the general rule is that there exists no power in the executive department to suspend the operation of statutes.[2] Parallel to the application of this principle, the Pres-

as an unlawful delegation of power. Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

17 King v. State, 87 Tenn. 304, 10 S. W. 509, 3 L.R.A. 210.

18 Ex parte Smythe, 56 Tex. Crim. Rep. 375, 120 S. W. 200, 23 L.R.A.(N.S.) 854, 133 Am. St. Rep. 976. See also next note, infra.

19 McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L.R.A.(N.S.) 188; Ex parte Mode, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918E, 845, overruled on other grounds in Lyle v. State, 80 Tex. Crim. Rep. 606, 193 S. W. 680, in which latter case the principle prohibiting suspension of the law except by the legislature only is approved, because of the later Texas constitutional provision now in force, to the effect that the power of suspending laws shall not be exercised except by the legislature.

20 Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

The only restriction on the power of the legislature to suspend the operation of a general law of the state is that the power when exercised must result in a suspension which is uniform, both in the privileges conferred and the liabilities imposed in its application to all persons and property similarly situated and in like condition within either the political territory or the class affected, and which shall not be an arbitrary classification, but one supported by some sound and defensible reason inherent in the subject matter. Carozza v. Federal Finance & Credit Co. 149 Md. 223, 131 A. 332, 43 A.L.R. 1.

1 Feek v. Bloomingdale, 82 Mich. 393, 47 N. W. 37, 10 L.R.A. 69. Cf. Texas cases cited supra, this section, note 19.

2 Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

The suspension of a statute is a legislative act unless based upon some condition, contingency, exigency, or state of facts declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended. Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826.

An order of a commission suspending for an entire year the right to hunt game within the state is legislation, power to enact which cannot be conferred by the legislature without indicating the conditions, contingency, exigency, or state of facts upon which the order shall be based. Ibid.

ident of the United States has no authority, even under the clause requiring him to see that the laws are faithfully executed, to suspend of his own motion the operation of acts of Congress.[3] Under certain circumstances, however, while Congress cannot under the Constitution delegate its legislative power to the President, it may authorize him to suspend, by proclamation, the operation of an act of Congress, when satisfied as regards certain facts. For example, Congress may make it the duty of the President to suspend certain provisions of an act on being satisfied that any foreign country exporting certain specified articles imposed duties on the products of the United States which he shall deem reciprocally unequal and unreasonable. In reference to such a statute it is said that such an act does not, in any real sense, invest the President with the power of legislation, since nothing involving the expediency or the just operation of such legislation is left thereby to his determination.[4]

2. Discretionary and Fact-finding Powers

a. Discretionary Powers Exercised by Administrative Officers

§ 232. Generally.—Every executive officer, when called upon to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do one thing or another,[5] for all laws are carried into execution by officers appointed or elected for the purpose. Hence, such officers are clothed with a power which often necessarily involves in a large degree the exercise of discretion and judgment. It is definitely settled that there are no constitutional objections to the exercise of such discretion by administrative officers.[6] The exercise of such discretion is not the exercise of judicial power within the meaning of that term as employed in the Constitutions forbidding one department from usurping the functions of another. It is at most quasi-judicial.[7] Moreover, the mere fact that a subordinate body is granted such discretion does not necessarily demonstrate that the discretion amounts to the use of a legislative power.[8] Although a legislature cannot divest itself of its

3 Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181.

4 Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606.

5 Hoff v. Jasper County, 110 U. S. 53, 28 L. ed. 68, 3 S. Ct. 416.

6 J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; Railroad Commission v. Alabama G. S. R. Co. 185 Ala. 354, 64 So. 13, L.R.A. 1915D, 98; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Chicago v. Marriotto, 332 Ill. 44, 163 N. E. 369, 60 A.L.R. 501; People v. Roth, 249 Ill. 582, 94 N. E. 953, Ann. Cas. 1912A, 100; Talarico v. Davenport, 215 Iowa, 186, 244 N. W. 759, citing R. C. L.; Loftus v. Department of Agriculture, 211 Iowa, 566, 232 N. W. 412 (appeal dismissed in 283 U. S. 809, 75 L. ed. 1427, 51 S. Ct. 647), citing R. C. L.; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68 A.L.R. 422; Fisher v. J. H. Sheridan Co. 182 S. C. 316, 189 S. E. 356, 108 A.L.R. 981; State ex rel. Richards v. Moorer, 152 S. C. 455, 150 S. E. 269 (writ of certiorari denied in 281 U. S. 691, 74 L. ed. 1120, 50 S. Ct. 238), citing R. C. L.; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604; Hacker v. Barnes, 166 Wash. 558, 7 P. (2d) 607, 80 A.L.R. 1212; State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500. See also Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A. 1917D, 414, Ann. Cas. 1917B, 713.

7 People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; State ex rel. Ellis v. Thorne, 112 Wis. 81, 87 N. W. 797, 55 L.R.A. 956.

8 People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188; Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68

proper function to determine what the law shall be, it may authorize others to do things which it itself might properly, but cannot understandingly or advantageously, do,[9] and since it cannot deal with the details of each particular case that may arise in the administration of an act, it must necessarily leave such details to the reasonable discretion of administrative officers.[10] The duty of the officers must, however, be a mere ministerial one, rather than one involving legislative discretion.[11]

There are several important classes of statutes under the provisions of which more or less discretion is given to executive officers. Among these may be mentioned the class which authorizes the adoption or promulgation of rules and regulations by administrative boards or officers;[12] that class directing such officers to ascertain facts on the occurrence of which the laws themselves become operative;[13] and that class which confers on executive officers the power to determine whether particular cases fall within or without the scope of the statutes which regulate or prohibit matters under the control of the legislature.[14]

§ 233. Applications of Discretionary Power.—Many examples of a valid exercise of discretionary power by administrative officers which does not amount to an invalid delegation of either legislative or judicial powers may be found in the decisions of the courts. For instance, a statute designed to protect and promote the horticultural interests of a state may declare that all places and orchards infected with certain pests mentioned in the statute are public nuisances. Such a law is not unconstitutional on the ground that it confers judicial powers on the horticultural commissioners, where a commissioner, in determining whether any particular place is a nuisance, must necessarily exercise some discretion which, in a strict sense, might be described as judicial in its nature.[15] The same principle applies to the exercise of powers by boards in regulating matters connected with infected animals.[16] Other illustrations may be given of the exercise of discretionary power by executive officers within permissible limits—as, for instance, the determination by a commission of the question as to which of two modes of construction and which of two termini shall be adopted for an authorized subway,[17] the selection of a site for a public building,[18] or the determination by an inspector of factories of the number, location, material, and construction of fire escapes in a certain class of buildings.[19]

A.L.R. 422; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.
Annotation: 79 L. ed. 486.

[9] Chicago v. Marriotto, 332 Ill. 44, 163 N. E. 369, 60 A.L.R. 501; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584.
See supra, § 214.

[10] People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500.

[11] Annotation: 12 A.L.R. 1452, s. 54 A.L.R. 1115, and 92 A.L.R. 416.

[12] See infra, § 240.

[13] See infra, §§ 235, 236.

[14] See infra, § 237.

[15] Los Angeles County v. Spencer, 126 Cal. 670, 59 P. 202, 385, 77 Am. St. Rep. 217; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894.
For general discussion of this and allied questions, see AGRICULTURE, Vol. 2, p. 433, § 39.

[16] Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.
Annotation: 65 A.L.R. 532; 43 L.R.A. (N.S.) 1068.
See generally ANIMALS, Vol. 2, p. 807, § 157.

[17] Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L.R.A.(N.S.) 980.
The legislature, having determined that a state highway shall be built, may confer on a commission absolute discretion to determine the feasibility and desirability of the route between any stated termini. Clendaniel v. Conrad, 3 Boyce (Del.) 549, 83 A. 1036, Ann. Cas. 1915B, 968, writ of error dismissed in 235 U. S. 712, 59 L. ed. 437, 35 S. Ct. 203.

[18] People v. Dunn, 80 Cal. 211, 22 P. 140, 13 Am. St. Rep. 118.

[19] Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357.

§ 234. Reasonable Exercise of Discretion and Arbitrary Power Distinguished.—In all cases where a law provides for the exercise of discretion by administrative officers, in order to be valid and escape the taint of unconstitutional exercise of legislative or judicial authority, the discretion must be lawfully exercised in accordance with established principles of justice.[20] It cannot be a mere arbitrary choice, for it has been said that in the American system of government no room is left for the play and action of purely arbitrary power.[1] A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second under certain circumstances is permissible.[2]

The practical question which arises in this problem is the determination of what is a proper and reasonable discretion and what is an invalid arbitrary discretion. The generally accepted rule as to this question is to the effect that a statute or ordinance vests an arbitrary discretion in administrative officers with respect to an ordinarily lawful business, profession, or appliance, if it fails to prescribe a uniform rule of action or fails to lay down a guide or standard whereby the exercise of discretion may be measured. Any law which authorizes the issuing or withholding of licenses, permits, or approvals or sanctions other administrative functions in such a manner as the designated officials arbitrarily choose, without reference to all of the class to which the law under consideration was intended to apply and without being controlled or guided by any definite rule or specified conditions to which all similarly situated may conform, is unconstitutional and void.[3] In the main, the validity

[20] State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488, 54 A.L.R. 1220.

[1] Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488, 54 A.L.R. 1220.

[2] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Klafter v. State Examiners, 259 Ill. 15, 102 N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221; Arms v. Ayer, 192 Ill. 601, 61 N. E. 851, 58 L.R.A. 277, 85 Am. St. Rep. 357; Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749; L. & M. Invest. Co. v. Cutler, 125 Ohio St. 12, 180 N. E. 379, 86 A.L.R. 707; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.

[3] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064 (a leading case); Montgomery v. West, 149 Ala. 311, 42 So. 1000, 9 L.R.A.(N.S.) 659, 123 Am. St. Rep. 33, 13 Ann. Cas. 651; People v. Monterey Fish Products Co. 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; Re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas. 1917D, 1127; Hewitt v. Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.(N.S.) 898, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 51 N. E. 758, 42 L.R.A. 696, 68 Am. St. Rep. 155; Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 6 Ann. Cas. 748; Richmond v. Dudley, 129 Ind. 112, 28 N. E. 312, 13 L.R.A. 587, 28 Am. St. Rep. 180; Bear v. Cedar Rapids, 147 Iowa, 341, 126 N. W. 324, 27 L.R.A.(N.S.) 1150; Anderson v. Wellington, 40 Kan. 173, 19 P. 719, 2 L.R.A. 110, 10 Am. St. Rep. 175; Boyd v. Frankfort, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Hagerstown v. Baltimore & O. R. Co. 107 Md. 178, 68 A. 490, 126 Am. St. Rep. 382; Bostock v. Sams, 95 Md. 400, 52 A. 665, 59 L.R.A. 282, 93 Am. St. Rep. 394; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Com. v. Maletsky, 203 Mass. 241, 89 N. E. 245, 24 L.R.A.(N.S.) 1168; Harrigan & R. Co. v. Burton, 224 Mich. 564, 195 N. W. 60, 33 A.L.R. 142; Re Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; St. Paul v. Laidler, 2 Minn. 190, Gil. 159, 72 Am. Dec. 89; Hays v. Poplar Bluff, 263 Mo. 516, 173 S. W. 676, L.R.A. 1915D, 595; Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686; People ex rel. Lieberman v. Vandecarr, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, affirmed in 199 U. S. 552, 50 L. ed. 305,

of a grant of discretion in any particular instance depends largely upon the nature of the business or thing with respect to which it is to be exercised and also upon whether or not the proper regulation and control thereof require that a discretion be vested in one or more public officials.[4]

It is well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action. On the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare.[5] This rule

26 S. Ct. 144; Bizzell v. Goldsboro, 192 N. C. 348, 135 S. E. 50, 49 A.L.R. 755; State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L.R.A. 423, 28 Am. St. Rep. 715; Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188; American Baseball Club v. Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 386, appeal dismissed in 290 U. S. 595, 78 L. ed. 524, 54 S. Ct. 128; Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156, 25 L.R.A. 621; Crossman v. Galveston, 112 Tex. 303, 247 S. W. 810, 26 A.L.R. 1210; Eureka City v. Wilson, 15 Utah, 67, 48 P. 150, 62 Am. St. Rep. 904; State ex rel. Makris v. Superior Ct. 113 Wash. 296, 193 P. 845, 12 A.L.R. 1248; State ex rel. Haddad v. Charleston, 92 W. Va. 57, 114 S. E. 378, 27 A.L.R. 323; State ex rel. Bluemound Amusement Park v. Milwaukee, 207 Wis. 199, 240 N. W. 847, 79 A.L.R. 281; State ex rel. Garrabad v. Dering (Re Garrabad) 84 Wis. 585, 54 N. W. 1104, 19 L.R.A. 858, 36 Am. St. Rep. 948.

Annotation: 12 A.L.R. 1436, s. 54 A.L.R. 1104, and 92 A.L.R. 401, 402.

A great many cases illustrative of the rule, stated in the text, holding that the particular delegation of authority involved was arbitrary and invalid are collated in the annotation: 12 A.L.R. 1437 et seq., s. 54 A.L.R. 1105 et seq., and 92 A.L.R. 403 et seq.

There are many cases in which the courts have recognized the rule that a statute or ordinance, in conferring discretion upon public officials, must also prescribe a rule of action, and have held that the rule was sufficiently complied with in the instances under consideration. These cases are collated in annotation: 12 A.L.R. 1445 et seq., s. 54 A.L.R. 1107 et seq., and 92 A.L.R. 407 et seq.

With respect to the applications of the various rules it cannot be gainsaid that there is considerable diversity of conclusion, and at least some real conflict of authority, some of the cases broadly asserting that statutes or ordinances vesting discretion in public officials should lay down rules and tests to guide and control such officers in the exercise of the granted discretion, and others not being so strict. Also involved in many cases is the question whether or not the regulation is one made by the enacting body in the exercise of its police power. Annotation: 12 A.L.R. 1435.

[4] Annotation: 12 A.L.R. 1435, s. 54 A.L.R. 1104, and 92 A.L.R. 401.

The general questions of the necessity of prescribing a definite rule of action for the guidance of public officials in whom a discretion has been vested and whether or not statutes or ordinances which confer such a discretionary power without having laid down rules for guidance can be successfully attacked on the ground that they confer arbitrary and uncontrolled powers which render them invalid are met under a great variety of circumstances of a diverse nature. The ultimate question in most cases becomes one of application to particular facts. Annotation: 12 A.L.R. 1435, s. 92 A.L.R. 401.

[5] Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 S. Ct. 190; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144, affirming 175 N. Y. 440, 67 N. E. 913, 103 Am. St. Rep. 781; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A. 1915B, 1097, Ann. Cas. 1916C, 280; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Arms v. Ayer, 192 Ill. 601, 58 L.R.A. 277, 61 N. E. 851, 85 Am. St. Rep. 357; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; State v. De Verges, 153 La. 349, 95 So. 805, 27 A.L.R. 1526; State ex rel. Altop v. Billings, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1091; Yee Bow v. Cleveland, 99 Ohio St. 269, 124 N. E. 132, 12 A.L.R. 1424, writ of error dismissed in 255 U. S. 578, 65 L. ed. 794, 41 S. Ct. 320; American Baseball Club v. Philadelphia, 312 Pa. 311, 167 A. 891, 92 A.L.R. 386, appeal dismissed in 290 U. S. 595, 78 L. ed. 524, 54 S. Ct. 128; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

Annotation: 12 A.L.R. 1447, s. 54 A.L.R. 1110, and 92 A.L.R. 410.

A statute is not invalid as clothing an administrative body with an arbitrary discretion, where the act provides the measure of compensation, prescribes the circumstances under which it is to be made, establishes administrative machinery for applying the statutory measure to the facts of each particular case, and provides for a hearing before an administrative tribunal and for judicial review upon all fundamental and jurisdictional questions. Hawkins v. Bleakly, 243 U. S. 210, 61 L. ed. 678, 37 S. Ct. 255, Ann. Cas. 1917D, 637.

An act permitting a commission to authorize the use of various percentages of catches of food fish in reduction plants is not invalid as vesting an unlawful discretion in the commission where the percentages to be allowed are to depend upon findings of facts after a hearing that there is no market for the fish and that their use in the reduction plant will not tend to impair or deplete that species of fish. People v. Monterey Fish Products Co. 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186.

A statute fixing the maximum dimensions, loaded weight, and speed of motor trucks does not unconstitutionally vest arbitrary power in the state highway commission by empowering it to permit, by general rules and regulations applicable to all alike, excess limitations as to load and dimensions above those prescribed by the statute "for special purposes," "for stated periods," and "to meet unusual conditions." Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[6] See LICENSES [Also 17 R. C. L. p. 532, § 49].

[7] Annotation: 92 A.L.R. 410.

No unconstitutional delegation of legislative or judicial power is made by provisions of a motor fuel tax law that the department of finance of the state shall fix the penalty of the bond required of distributors of motor fuel at such amount as in its opinion will protect the state against failure to pay the amounts required by the provisions of the act in respect of motor fuel sold and used, taking into consideration the amount of business reasonably expected to be handled by the distributor. People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500.

[8] P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 505, 54 S. Ct. 277, 90 A.L.R. 1285.

[9] Annotation: 87 A.L.R. 47.

[10] See supra, § 216.

[11] Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 S. Ct. 436; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 S. Ct. 228; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, citing R. C. L.

Annotation: 79 L. ed. 481.

[12] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 S. Ct. 436; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 S. Ct. 228; The Aurora v. United States, 7 Cranch (U. S.) 382, 3 L. ed. 378; Sproles v.

and various applications and modifications of it arise most often in those cases dealing with licenses. In such cases the general principle that arbitrary discretion may not be granted is controlling, although it has been said that a more arbitrary discretion may be lawfully delegated to public officials without prescribing definite rules of action in those cases where the granting of licenses relates to a business the carrying on of which is a mere matter of privilege because the business itself is of a character tending to be injurious.[6]

The modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.[7] Thus, a provision in a statute fixing units of weight for loaves of bread made for sale in the state and directing the state secretary of agriculture to prescribe permissible tolerances in excess of the specified weight and the time for which such weight shall be maintained, that it shall not apply to fancy breads and impliedly directing that the secretary of agriculture shall ascertain what is covered by the exception, does not render the statute invalid as operating to vest arbitrary power in him.[8] Quite similarly, "blue sky laws" have been consistently upheld when assailed upon the ground that the powers conferred upon the security commissioner were arbitrary and not framed so as to permit the exercise of only a proper and administrative discretion.[9]

b. Power to Ascertain Facts

§ 235. Generally.—In accordance with the power of the legislature to enact laws the effect and operation of which are made dependent on the happening of certain contingencies,[10] the condition selected may be the ascertainment of particular facts by executive or other officers.[11] This has given rise to the well-established distinction that although the legislature cannot delegate its powers to make a law, it can delegate a power to determine some fact or state of things on which the law may depend.[12] Moreover, the disposition in more

recent times is to uphold provisions permitting administrative officers to determine conditions under which a law may or may not apply, as against the objection that a delegation of legislative power is thereby made.[13]

The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers.[14] Accordingly, a statute may give to nonjudicial officers the power to declare the existence of facts which call into operation its provisions[15] and, similarly, may grant to commissioners

Binford (D. C.) 52 F. (2d) 730, citing R. C. L.; Sears, R. & Co. v. Federal Trade Commission (C. C. A. 7th) 258 F. 307, 6 A.L.R. 358; State v. Davis, 178 Ark. 153, 10 S. W. (2d) 513, citing R. C. L.; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; Pueblo County v. Smith, 22 Colo. 534, 45 P. 357, 33 L.R.A. 465; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; People ex rel. Thomson v. Barnett, 344 Ill. 62, 176 N. E. 108, 76 A.L.R. 1044; Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L.R.A. 84, 53 Am. St. Rep. 325; Arnett v. State, 168 Ind. 180, 80 N. E. 153, 8 L.R.A. (N.S.) 1192; Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396, 159 S. W. 971, 48 L.R.A.(N.S.) 667; State ex rel. Porterie v. Grace, 184 La. 443, 166 So. 133, citing R. C. L.; Tighe v. Osborne, 150 Md. 452, 133 A. 465, 46 A.L.R. 80; Rock v. Carney, 216 Mich. 280, 185 N. W. 798, 22 A.L.R. 1178; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; People v. Butte, 4 Mont. 179, 1 P. 414, 47 Am. Rep. 346; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; L. & M. Invest. Co. v. Cutler, 125 Ohio St. 12, 180 N. E. 379, 86 A.L.R. 707; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, citing R. C. L.; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; Livesay v. De Armond, 131 Or. 563, 284 P. 166, 68 A.L.R. 422; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716 (leading case); State ex rel. Port Royal Min. Co. v. Hagood, 30 S. C. 519, 9 S. E. 686, 3 L.R.A. 841; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L.R.A. 167; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367, affirmed in — Tex. —, 98 S. W. (2d) 781; Thompson v. Smith, 155 Va. 367, 154 S. E. 679, 71 A.L.R. 604; Re North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L.R.A. 638; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 65 N. W. 738, 31 L.R.A. 112.

Annotation: 79 L. ed. 481.

A statute providing that the governor should have the power to relieve any public officer in the state or his bondsman from the payment of public funds on deposit in an insolvent bank which had been officially designated as a state or county depository has been upheld as against the contention that it was a delegation of legislative power. It provided that the governor might examine and look into the facts as a part of the enforcement of the law, which action of the governor would be merely the exercise of the power to ascertain the facts in the case as a basis for putting the law into operation. Annotation: 96 A.L.R. 296, 297.

[13] Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

[14] Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 S. Ct. 75 (award in Indian claims case); Hoff v. Jasper County, 110 U. S. 53, 28 L. ed. 68, 3 S. Ct. 416; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. Rep. 175; Talarico v. Davenport, 215 Iowa, 186, 244 N. W. 750, citing R. C. L.; Loftus v. Department of Agriculture, 211 Iowa, 566, 232 N. W. 412 (appeal dismissed in 283 U. S. 809, 75 L. ed. 1427, 51 S. Ct. 647), citing R. C. L.; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Fassing v. State, 95 Ohio St. 232, 116 N. E. 104, citing R. C. L.; Missouri, K. & T. R. Co. v. Shannon, 100 Tex. 379, 100 S. W. 138, 10 L.R.A.(N.S.) 681.

Judicial powers are not conferred upon a state auditor by a statute requiring him to certify on municipal bonds that there has been a compliance with all the conditions essential to authorize their issuance. Hoff v. Jasper County, 110 U. S. 53, 28 L. ed. 68, 3 S. Ct. 416.

The legislation of Congress from the beginning has proceeded on the conception that it is within the competency of Congress when legislating as to matters exclusively within its control to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power. Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 S. Ct. 671.

[15] Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 S. Ct. 31 (deportation of an alien); United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 S. Ct. 719 (immigration act); Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, citing R. C. L.

and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of particular laws.[16]

§ 236. Applications of General Rule.—Many cases have arisen in which the power given to administrative officers to ascertain facts which call into operation a statute has been sustained as not legislative or judicial within constitutional inhibitions. One example of power so delegated validly is the determination of the efficiency of rival voting machines and the selection of the one to be used in carrying out an act substituting voting machines for the ballot system.[17] Another example is the determination by health officers of what occupations are dangerous, under a statute forbidding the employment of minors in dangerous occupations.[18] Similarly, judicial power is not vested in a commission by a statute providing that a provision requiring employers advertising for help during a strike to mention its existence shall cease to be operative when the state board of conciliation shall determine that the business of the employer is being carried on in the usual extent.[19] The legislature, having power to prescribe and regulate the terms and conditions upon which corporations may distribute capital assets upon reduction of their stock capitalization, may provide for an officer or tribunal to entertain, hear, and determine certain matters relating to the exercise on the part of corporations of the right or privilege of effectuating a diminution of their capital stock and actual capital.[20]

Statutes regulating motor vehicles often prescribe administrative ascertainment of facts. Thus, in a statute relating to headlight requirements the legislature may provide for a testing agency to ascertain whether or not there has been compliance with the law.[1] A statute and ordinance requiring resident owners of motor vehicles to submit them, not more often than semiannually, for inspection to determine whether they conform to statutory requirements as to equipment for safe operation do not unconstitutionally delegate arbitrary judicial powers to the department of police, since the tester is not clothed with any discretion to determine whether the equipment is sufficient for safe driving, but is charged solely with determining whether or not such equipment complies with statutory requirements.[2]

One of the most important types of cases in which this question has been presented is that involving the taking over and liquidation of banks. It has been repeatedly held that a statute which authorizes the state superintendent of banks to take over and liquidate banks which he finds to be insolvent or unsafe is not unconstitutional as an attempt to delegate judicial power.[3] The same principle applies to action by the Comptroller of the

[16] Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Fassig v. State, 95 Ohio St. 232, 116 N. E. 104, citing R. C. L.

[17] Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270.

[18] Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396, 156 Ky. 222, 159 S. W. 971, 160 S. W. 942, 48 L.R.A.(N.S.) 667.

[19] Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659.

[20] Dominguez Land Corp. v. Daugherty, 196 Cal. 453, 238 P. 697, 44 A.L.R. 1.

[1] See AUTOMOBILES, Vol. 5, p. 533, § 26.

[2] Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789.

Annotation: 106 A.L.R. 795.

[3] Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Robinson v. People's Bank, 266 Mich. 178, 253 N. W. 259, 92 A.L.R. 1251 (appointment of conservator); American State Bank v. Jones, 184 Minn. 498, 239 N. W. 144, 78 A.L.R. 770.

Annotation: 78 A.L.R. 774; 92 A.L.R. 1258 (appointment of conservator).

For a general discussion of the determination of the insolvency of banks, see BANKS, Vol. 7, p. 514, §§ 710 et seq.

Currency with respect to the liquidation of national banks.[4] Moreover, giving the Comptroller of the Currency power to make a ratable call upon the stockholders of a national bank does not vest him with judicial power in violation of the Constitution.[5] The same rule applies to superadded liability assessment by a state banking officer.[6]

No delegation of legislative functions is involved in general laws providing for the incorporation of municipal corporations, fixing the conditions on which they may be created and imposing on some officer or official body the duty of determining whether such conditions exist,[7] or in laws delegating power to the state insurance commissioner to ascertain under what circumstances a statute establishing a state fire and tornado fund for insurance upon state and subdivision property operates.[8]

§ 237. Power to Determine Cases within Statute.—One important class of cases in which discretion may properly be vested in administrative officers,[9] which class is almost an operation of the general rule relating to the ascertainment of facts,[10] consists of those cases in which a general rule or prohibition is laid down, and power is vested in an executive officer to determine when particular cases do or do not fall within such rule or prohibition.[11] Power exercised under such statutes, calling for the exercise of judgment in the execution of a ministerial act, is never judicial in nature within the sense prohibited by the Constitution.[12] For example, Congress may declare that navigation shall be free from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects, and may stop with this declaration of a general rule and impose upon administrative officers the duty of ascertaining what particular cases come within it, as well as the duty of enforcing the rule in such cases. It has been held that the Secretary of War in performing that duty is merely executing the mandate of Congress, and is not in any true sense exerting either legislative or judicial power.[13]

[4] Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 S. Ct. 385; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 S. Ct. 209.
Annotation: 78 A.L.R. 774.

[5] Christopher v. Norvell, 201 U. S. 216, 50 L. ed. 732, 26 S. Ct. 502, 5 Ann. Cas. 740; Re Chetwood, 165 U. S. 443, 41 L. ed. 782, 17 S. Ct. 385; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 S. Ct. 209; Kennedy v. Gibson, 8 Wall. (U. S.) 498, 19 L. ed. 476.
Annotation: 78 A.L.R. 775.
See also BANKS, Vol. 7, p. 35, § 14.

[6] Rainey v. Michel, 6 Cal. (2d) 259, 57 P. (2d) 932, 105 A.L.R. 148; Broderick v. McGuire, 119 Conn. 83, 174 A. 314, 94 A.L.R. 890 (semble, construing New York law); American State Bank v. Jones, 184 Minn. 489, 239 N. W. 144, 78 A.L.R. 770.
Annotation: 78 A.L.R. 775.
There seems to be a tendency in at least one jurisdiction to regard such duties assigned by statute as of a highly judicial character so that they may not be vested in ministerial officers. Annotation: 78 A.L.R. 778, 779 (Tennessee).
As to the necessity and amount of superadded liability assessment generally, see BANKS, Vol. 7, p. 101, §§ 126 et seq.

[7] Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A.L.R. 1056.

[8] State ex rel. Missoula v. Homes, 100 Mont. 256, 47 P. (2d) 624, 100 A.L.R. 581; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337.
Annotation: 100 A.L.R. 601.

[9] See supra, § 231.

[10] See supra, § 235.

[11] Bourjois v. Chapman, 301 U. S. 183, 81 L. ed. 1027, 57 S. Ct. 691; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; Monroe v. Withycombe, 84 Or. 328, 165 P. 227, citing R. C. L.

[12] Arms v. Ayer, 192 Ill. 601, 61 N. E. 351, 58 L.R.A. 277, 85 Am. St. Rep. 357; St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L.R.A.(N.S.) 918, 109 Am. St. Rep. 778, 4 Ann. Cas. 112.

[13] Louisville Bridge Co. v. United States, 242 U. S. 409, 61 L. ed. 395, 37 S. Ct. 158; Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. ed. 435, 30 S. Ct. 356; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 S. Ct. 357; Miller v. New York, 109 U. S. 385, 27 L. ed. 971, 3 S. Ct. 228. See also Hannibal Bridge Co. v. United States, 221 U. S. 194, 55 L. ed. 699, 31 S. Ct. 603.
Annotation: 79 L. ed. 542.
Whether Congress can lawfully delegate to the Secretary of War all its powers to authorize structures of every kind over all navigable waters is not decided. Lake

Similarly, the legislature may delegate to a commission the power to determine what brooks and rivers of a state have in them fish of sufficient value to warrant the application of a statutory prohibition against the discharge of injurious matter therein.[14] As against the same objections, a statute has been sustained which provides that persons taking into their home a child committed to the care of a welfare agency shall enter into an agreement to return the child whenever, in the opinion of the agency, the best interests of the child shall require it, where, under the provisions of the statutes dealing with children who are wards of the state, the final determination of the welfare of such a ward is in the court under whose guardianship it remains.[15] Moreover, judicial powers are not delegated to a special jury commissioner by providing that he shall eliminate from the jury list persons declared by law to be unfit or disqualified to sit in criminal cases, and thus prepare a list from which a panel of fit and impartial jurors may be chosen.[16]

3. Extent and Limitations of Powers Delegable to Administrative Officers and Boards

a. In General

§ 238. Legislative Powers Conferred on Executive Officers.—In accordance with the doctrine as to the separation of the powers of government[17] and the prohibition implied therein as to the delegation to another department of the powers strictly belonging to the legislative department,[18] it is generally recognized that the legislature of a state cannot transfer or delegate any strictly legislative powers to the governor,[19] such as the power to create offices.[20] This restriction does not necessarily apply to powers of a more general nature. It has been held that the fixing of compensation, within maximum and minimum limits, of a police officer is not so inherently of a legislative character that the authority to do so cannot be delegated to the governor.[1] The legislature, however, may not validly delegate to the secretary of state the power to employ agents and incur expense where no manner of limitation is placed upon the kind of persons he may employ, the salaries he may pay, or the expenditures he may authorize.[2] Although it is customary in the American system of government to intrust to the governor a qualified veto, he as chief executive has no real legislative functions.[3]

By analogy these limitations have been applied to the delegation of power by the legislative to the executive department of a municipal corporation. For example, it has been held that an ordinance closing liquor saloons between certain designated hours unless allowed to remain open by special permission

Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 S. Ct. 357.

[14] Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630.

[15] Turner v. Children's Home Soc. 158 Va. 406, 163 S. E. 399, 80 A.L.R. 1125.

[16] People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L.R.A. 247.

[17] See supra, §§ 180 et seq.

[18] See supra, § 214.

[19] Langworthy v. Kadel, 141 Kan. 250, 40 P. (2d) 443, citing R. C. L.; Oakland State Bank v. Bolin, 141 Kan. 126, 40 P. (2d) 437, citing R. C. L.; State ex rel. Young v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.

[20] State ex rel. Young v. Butler, 105 Me. 91, 73 A. 560, 24 L.R.A.(N.S.) 744, 18 Ann. Cas. 484.
Annotation: 18 Ann. Cas. 489.

[1] Arnett v. State, 168 Ind. 180, 80 N. E. 153, 8 L.R.A.(N.S.) 1192.

[2] State ex rel. Fargo v. Wetz, 40 N. D. 299, 168 N. W. 835, 5 A.L.R. 731.

[3] Oakland State Bank v. Bolin, 141 Kan. 126, 40 P. (2d) 437, citing R. C. L.; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L.R.A. 243.

of the mayor of the municipality is invalid as a delegation of legislative power to the chief executive officer of the city.[4]

The same principles have been applied to Federal legislation, and it is recognized that Congress cannot delegate legislative power to the President of the United States.[5] In most instances, however, it has been deemed that the powers so delegated to the President were not purely legislative. An early statute delegating authority to the President to make orders concerning the conduct of privateers was sustained;[6] and from a comparatively early date in our national history various laws vesting power in the President to make orders, rules, and regulations have been upheld as against vigorous contention that they invalidly delegated the lawmaking power to the law enforcers.[7]

The economic depression of 1929 produced conditions which impelled Congress and many of the state legislatures to exercise many powers ordinarily called into play only in times of emergency. Much of the legislation and legislative action either required directly or contemplated the exercise of unusual powers by the executive department of the government. In many cases the delegation of powers to the executive branch by laws attempting to alleviate the economic pressure was sustained. When such laws, however, went beyond the legitimate pale of permissible delegation in attempting to vest in administrative officers purely legislative powers, they were emphatically rejected by the courts as invalid.[8]

§ 239. —Rule in International or External Affairs of the United States.—In internal affairs Congress must retain the lawmaking power given to it in the enumerated grants of the Federal Constitution, and cannot abdicate its functions to the executive department.[9] Quite a different principle applies, however, to matters which are solely external and in which the power of the United States is exercised as a sovereign nation in the field of international relations. The differences between the powers of the United States Government in respect of foreign or external affairs and those in respect of domestic or internal affairs are such that legislative power is not unlawfully delegated by a joint resolution of Congress to the effect that if the President shall find that the prohibition of the sale of arms and munitions of war in the United States to certain belligerents may contribute to the re-establishment of peace between them, and if after consultation with the governments of other American republics and with their co-operation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, then it shall be unlawful to sell—except under such limitations and exceptions as the President prescribes—any arms or munitions of war in any place in the United States to such belligerents or to anyone acting in the interest of either, until otherwise authorized by the President or Congress.[10]

[4] Little Chute v. Van Camp, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100.

[5] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525.
Annotation: 79 L. ed. 581.

[6] The Thomas Gibbons, 8 Cranch (U. S.) 421, 3 L. ed. 610.

[7] See infra, § 240.

[8] Annotation: 86 A.L.R. 1554 et seq., s. 88 A.L.R. 1523, and 96 A.L.R. 314, 831 et seq.; 79 L. ed. 581.

[9] See supra, § 214.

[10] United States v. Curtiss-Wright Export Corp. 299 U. S. 304, 81 L. ed. 255, 57 S. Ct. 216.

b. Power to Promulgate Rules and Regulations

§ 240. Generally.—One of the most important limitations on the general prohibition of the delegation of legislative power to executive officers[11] consists of a recognition of the right of the legislature under certain circumstances to delegate to executive or administrative officers and boards authority to promulgate rules and regulations.[12] The authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and enforcement of a law is not an exclusively legislative power, but is rather administrative in its nature.[13] The legislature may not, however, delegate to administrative officers the determination of what the law shall be or what acts are necessary to effectuate the law.[14]

The policy of the law favors the placing of detailed responsibility in administrative officers. The courts uphold statutes vesting such powers in such officers if it is possible fairly to do so,[15] at least where the powers are merely ministerial.[16] In order to justify the courts in declaring a statute imposing particular duties or conferring authority upon administrative officers to be inoperative as a delegation of legislative power, it must clearly appear beyond a reasonable doubt that the duty or authority so imposed or conferred is one appertaining exclusively to the legislative department and that the delegation of it is not warranted under the provisions of the Constitution.[17]

The general principle governing the conditions under which the power to make rules and regulations may be delegated has been stated as follows: A legislature, in enacting a law complete in itself and designed to accomplish

[11] See supra, § 214.

[12] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Tysco Oil Co. v. Railroad Commission (D. C.) 12 F. Supp. 195, citing R. C. L.; Alabama Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; Curlee v. State, 16 Ala. App. 62, 75 So. 268, citing R. C. L.; Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867, citing R. C. L.; Snow v. Riggs, 172 Ark. 835, 290 S. W. 591, citing R. C. L.; Fillmore Union High School Dist. v. Cobb, 5 Cal. (2d) 26, 53 P. (2d) 349, citing R. C. L.; Stanislaus County Dairymen's Protective Asso. v. Stanislaus County, — Cal. App. (2d) —, 58 P. (2d) 706, citing R. C. L.; Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897; State v. Retowski, 36 Del. 330, 175 A. 325, citing R. C. L.; State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705, 95 A.L.R. 1416; State ex rel. Taylor v. Jacksonville, 101 Fla. 1241, 133 So. 114, citing R. C. L.; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Chambers v. McCollum, 47 Idaho, 74, 272 P. 707, citing R. C. L.; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093; People v. Roth, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100; Re Consolidated Freight Co. 265 Mich. 340, 251 N. W. 431, citing R. C. L.; Rock v. Carney, 216 Mich. 280, 185 N. W. 798, 22 A.L.R. 1178; Public Serv. Commission v. St. Louis-San Francisco R. Co. 301 Mo. 157, 256 S. W. 226, citing R. C. L.; State ex rel. Killam v. Colbert, 273 Mo. 198, 201 S. W. 52, citing R. C. L.; State ex rel. Hughes v. Milhollan, 50 N. D. 184, 195 N. W. 292, citing R. C. L.; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; Fisher v. J. H. Sheridan Co. 182 S. C. 316, 189 S. E. 356, 108 A.L.R. 981; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L.R.A. 167; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781) citing R. C. L.; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.
Annotation: 79 L. ed. 489.

[13] State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.
Annotation: 79 L. ed. 490.

[14] People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Smithberger v Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

[15] State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639.
Where a duly enacted statute confers upon officials authority that is not in its nature exclusively and purely a legislative, executive, or judicial power, such authority may be construed as an administrative duty, rather than as a governmental power, if it can fairly be done to accomplish a valid legislative purpose. Ibid.

[16] State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

[17] Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L.R.A.1916D, 913.

the regulation of particular matters falling within its jurisdiction, may expressly authorize an administrative commission, within definite valid limits, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.[18] So long as a policy is laid down and a standard is established by a statute, no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities both the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[19] A distinction is drawn between the more important subjects which must be entirely regulated by the legislature itself and those of less interest as to which general provisions may be made and power given to administrative officers to carry out the details under such general provisions.[20]

It is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations.[1] Clearly, the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases. It must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law,[2] because regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute, and must, moreover, be within the framework of such policy.[3] The Supreme Court has laid down certain rules and governing considerations under which the delegation can be scrutinized. In the first place, the legislature may declare its will and, after fixing a primary standard, devolve upon administrative

[18] United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42; Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867, citing R. C. L.; Fillmore Union High School Dist. v. Cobb, 5 Cal. (2d) 26, 53 P. (2d) 349, citing R. C. L.; Stanislaus County Dairymen's Protective Asso. v. Stanislaus County, — Cal. App. (2d) —, 58 P. (2d) 706, citing R. C. L.; State v. Retowski, 36 Del. 330, 175 A. 325, citing R. C. L.; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A. (N.S.) 639; People v. Roth, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100; Chambers v. McCollum, 47 Idaho, 74, 272 P. 707, citing R. C. L.; People ex rel. Rice v. Wilson Oil Co. 364 Ill. 406, 4 N. E. (2d) 847, 107 A.L.R. 1500; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A. 1918C, 933; Re Consolidated Freight Co. 265 Mich. 340, 251 S. W. 431, citing R. C. L.; State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681, writ of error dismissed in (U. S.) 46 L. ed. 1263, 22 S. Ct. 931; Wilson v. Kirkpatrick, 144 Okla. 44, 289 P. 306, citing R. C. L.; Cancilla v. Gehlhar, 145 Or. 184, 27 P. (2d) 179, citing R. C. L.; Winslow v. Fleischner, 112 Or. 23, 228 P. 101, 34 A.L.R. 826; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781), citing R. C. L.; O'Brien v. Ammerman (Tex. Civ. App.) 233 S. W. 1016 (affirmed in 112 Tex. 254, 247 S. W. 270), citing R. C. L.; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; State v. Goss, 79 Utah, 559, 11 P. (2d) 340, citing R. C. L.

Annotation: 79 L. ed. 489; 32 L.R.A. (N.S.) 639.

[19] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686; Brown v. Humb'e Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393.

[20] Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525; Bailey & Bean v. Wilson, 128 Miss. 49, 90 So. 362, citing R. C. L.; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924, citing R. C. L.; Brown v. Humble Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; State v. Goss, 79 Utah, 559, 11 P. (2d) 340, citing R. C. L.; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

Annotation: 99 A.L.R. 1120 (oil and gas).

[1] United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480.

[2] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947; Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

Annotation: 92 A.L.R. 400, 79 L. ed. 487.

[3] Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; Brown v. Humb'e Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393; Chas. Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181.

Annotation: 98 A.L.R. 1196.

officers the power to fill up the details by prescribing administrative rules and regulations.[4] Thus, if Congress lays down by legislative act an intelligent principle to which the person or body authorized to fix the rate of customs duties on imported merchandise is directed to conform, such legislative action is not a forbidden delegation of legislative power.[5] The Supreme Court has also held that in the determination of what the legislature may do in seeking assistance from administrative officers, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental co-ordination.[6]

The decisions, by a process of sanction or repudiation, have illustrated the limits to which the legislature may extend the generalities of its grant. As far as the actual terms of the standard laid down are concerned, there seems to be considerable leeway, because the courts have indicated that the policy of the lawmaking body and the standard to guide the administrative agency may be laid down in broad and general terms.[7] The Supreme Court has pointed out that undoubtedly legislation must often be adapted to complex conditions involving a host of details with which Congress cannot deal directly. The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards.[8] Yet the standard and policies, though they may be stripped to a generality as far as the elimination of detail in terms is concerned, must be definite in boundary, for the power thus delegated derives its legality largely from the clarity of its confines and the sharpness with which the extent of authority granted to the administrative agency is marked. Although there is no standard, definite or even approximate, to which legislation must conform, "it is not validly enacted where it produces a delegation of legislative authority which is unconfined, vagrant, and not canalized within banks to keep it from overflowing."[9] Thus, the authority attempted to be delegated to the President by Congress under the National Industrial Recovery Act, limiting his powers in no way and extending his discretion to all the varieties of laws which he might deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country, thereby allowing him to impose within his discretion his own conditions to effectuate a so-called "policy," which was merely a statement of opinion, was such a sweeping delegation of powers properly exercisable only by the legislature itself as to fall beyond the pale of constitutional limits.[10] "There can be no grant to the executive of any roving commission to inquire into evils and, upon discovering them, to do

[4] United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42.

Annotation: 79 L. ed. 490.

[5] J. W. Hampton Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348.

[6] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348.

Annotation: 79 L. ed. 488.

[7] Annotation: 79 L. ed. 488.

[8] Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241.

[9] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947 (Cardozo, J., concurring); Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[10] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947.

Annotation: 92 A.L.R. 1464 et seq. (early cases); 95 A.L.R. 1394 (Ryan Case and others); 79 L. ed. 581 (Ryan and A. L. A. Schechter Poultry Corp. Cases).

Legislative power is unconstitutionally delegated by the provisions of § 3 of the National Industrial Recovery Act of June 16, 1933, authorizing the making of Codes for the government of trades and industries by or with the approval of the President of the United States, without setting up any standards aside from the statement of the general aim of rehabilitation, correction, and development of trades and industries. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947.

anything he pleases to correct them." A statute which attempts to provide that anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code amounts to delegation running riot, and no such plenitude of power is susceptible of transfer.[11] The same requirement found wanting the so-called standard "prescribing the prohibition of transportation of oil," which nowhere contained a definition of the conditions under which transportation was to be allowed or prohibited.[12] Prescribing the public good as the standard for the administrative officer's action does not mark the limits of power.[13] A policy "to maintain a balance between agricultural producers and consumers, to restore normal economic conditions, and to eliminate unfair practices" will not warrant a carte blanche transfer of authority to the state agricultural department over the control generally of vegetable produce.[14] Nor is vesting in a commission power to reject or reduce items in the budgets of tax-levying bodies permissible without prescribing any standard other than the securing of efficient and economical administration.[15] A state social security law which leaves every matter connected with a fund to be appropriated to the discretion of a state assistance committee is invalid because it establishes no standard for allocation of the fund among the purposes set out in the act.[16]

On the other hand, the authority granted to the President under that part of the National Industrial Recovery Act authorizing loans and grants to states and municipalities for constructing public works or projects which specifies reasonably secured loans and loans calculated to increase employment has been held to be a valid delegation of power on the ground that the statute lays down a legislative standard and declares a legislative policy with requisite definiteness.[17] It should also be stated that in by far the greater number of cases where the general question has been considered by the courts, the statute involved has been held to be valid and the delegation proper under a sufficiently limiting standard.[18]

Although the power to make rules may be validly delegated, it must nevertheless be exercised in a reasonable manner; otherwise, in spite of the valid existence of the power, the acts done under it will be invalid because constitutional rights of persons are violated by the unreasonable way in which the delegated power is exercised. Hence, the grant of legislative authority to a public commission to make rules and regulations for the government and use of boulevards under its care, although valid as to the power delegated, does not confer arbitrary power to deprive abutting owners of an easement conferred either by a grant or by implication.[19] In all cases the rules and regulations may be tested in the courts to determine whether they are reasonably

[11] A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A.L.R. 947 (Cardozo, J., concurring).

[12] Panama Ref. Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241.

[13] Ibid.

Annotation: 79 L. ed. 581.

[14] Chas. Uhden v. Greenough, 181 Wash. 412, 43 P. (2d) 983, 98 A.L.R. 1181.

[15] Portland v. Welch, 154 Or. 286, 59 P. (2d) 228, 106 A.L.R. 1188.

[16] Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A.L.R. 686.

Annotation: 100 A.L.R. 698.

[17] Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479.

Annotation: 100 A.L.R. 1501.

[18] See authorities cited in this and following sections. The cases in which the delegation has been held unlawful have been set out more in detail for the convenience of the reader, since those cases discuss the basic principles involved more fully than those cases in which the delegation is upheld.

[19] Anzalone v. Metropolitan Dist. Commission, 257 Mass. 32, 153 N. E. 325, 47 A.L.R. 897.

As to the discretion of administrative officers generally, see supra, § 234.

directed to the accomplishment of the purposes of the statute under which they are made.[20] Moreover, regulations promulgated by administrative departments may not extend the statute or modify its provisions.[1]

§ 241. Applications of Delegated Rule-making Power.—Situations in which the various lawmaking bodies have delegated to administrative officers or boards the power to make regulations and to prescribe the necessary details to effectuate the declared policy of the law are very numerous and constantly increasing.[2] Statutes conferring the power on executive officers to establish rules and regulations may be enacted by Congress,[3] as well as by a state legislature;[4] and this power may be conferred not only on executive officers, but also on administrative boards.[5]

As illustrations of the proper exercise of the power of Congress to delegate authority to establish rules and regulations may be mentioned: Acts permitting an executive officer to establish rules as to the navigation of particular waters[6] or of canals owned by the United States;[7] an act permitting the Secretary of War to determine the amount of water that can safely be taken from the Great Lakes;[8] acts sanctioning the establishment of rules and regulations regarding aviation, aircraft,[9] and radio;[10] acts authorizing the President of the United States to make rules and regulations to carry into effect both the law for calling out the Militia[11] and the Selective Draft Law;[12] an act authorizing the President to determine differences in cost of production here and abroad and to increase or decrease tariff rates to equalize the cost of production;[13] the income tax provisions of the Tariff Act of 1913[14] conferring certain powers on the Secretary of the Treasury and authorizing him to establish certain standards as to imports on the recommendation of a board of experts;[15] and

[20] Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Welch v. Swasy, 193 Mass. 364, 79 N. E. 745, 23 L.R.A. (N.S.) 1160, 118 Am. St. Rep. 523; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

[1] Campbell v. Galeno Chemical Co. 281 U. S. 599, 74 L. ed. 1063, 50 S. Ct. 412; Fisher v. J. H. Sheridan Co. 182 S. C. 316, 189 S. E. 356, 108 A.L.R. 981.

[2] See cases cited infra, notes 3–20, 1–13, this section.

[3] Wisconsin v. Illinois, 278 U. S. 367, 73 L. ed. 426, 49 S. Ct. 163; United States v. Chemical Foundation, 272 U. S. 1, 71 L. ed. 131, 47 S. Ct. 1 (authorizing the Alien Property Custodian to sell property in accordance with the determination of the President); Mahler v. Eby, 264 U. S. 32, 65 L. ed. 549, 44 S. Ct. 283 (conferring power on the Secretary of Labor to select persons for deportation within a general classification); United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L.R.A. (N.S.) 752, 109 Am. St. Rep. 630.

[4] Lacoste v. Department of Conservation, 263 U. S. 545, 68 L. ed. 437, 44 S. Ct. 186; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424.

[5] State Racing Commission v. Latonia Agricultural Asso. 136 Ky. 173, 123 S. W. 681, 25 L.R.A.(N.S.) 905.

[6] Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321.

Annotation: 79 L. ed. 541.

[7] Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749.

[8] Wisconsin v. Illinois, 278 U. S. 367, 73 L. ed. 426, 49 S. Ct. 163.

[9] Smith v. New England Aircraft Co. 270 Mass. 511, 170 N. E. 385, 69 A.L.R. 300.

Annotation: 79 L. ed. 579.

For a general discussion and allied questions, see AVIATION, Vol. 6, p. 7, §§ 7 et seq.

[10] Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co. 289 U. S. 266, 77 L. ed. 1166, 53 S. Ct. 627, 89 A.L.R. 406.

Annotation: 79 L. ed. 579.

[11] Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525.

See MILITARY [Also 18 R. C. L. p. 1015, § 5].

[12] Kramer v. United States, 245 U. S. 478, 62 L. ed. 413, 38 S. Ct. 168; Jones v. Perkins, 245 U. S. 390, 62 L. ed. 358, 38 S. Ct. 166; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L.R.A.1918C, 361, Ann. Cas. 1918B, 856; Franke v. Murray (C. C. A. 8th) 248 F. 865, L.R.A.1918E, 1015, Ann. Cas. 1918D, 98.

Annotation: 7 B. R. C. 600.

[13] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348.

[14] Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A.1917D, 414, Ann. Cas. 1917B, 713.

[15] Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349.

an act giving authority to the Federal Reserve Board to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds.[16]

Instances may be given of the operation of the same principle under state statutes, such as the empowering of boards and commissioners to regulate the taking of fish[17] or the construction of fishways;[18] and the regulations prescribed under legislative authority by boards of health,[19] humane societies,[20] cemetery associations,[1] police commissioners,[2] medical examiners,[3] dental examiners,[4] optometry boards,[5] pharmacy boards,[6] civil service commissioners,[7] insurance boards,[8] banking commissioners or superintendents,[9] drainage and irrigation commissioners,[10] agricultural boards,[11] school boards,[12] and state railway commissions.[13]

§ 242. Powers Delegated to Administrative Boards.—There are no constitutional objections arising out of the doctrine of the separation of the powers of government[14] to the creation of administrative boards empowered within certain limits to adopt rules and regulations[15] and authorized to see that the

16 First Nat. Bank v. Fellows, 244 U. S. 416, 61 L. ed. 1233, 37 S. Ct. 734, L.R.A. 1918C, 283, Ann. Cas. 1918D, 1169; People ex rel. First Nat. Bank v. Brady, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C, 1093.

17 Ex parte Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700; Payne v. Providence Gas Co. 31 R. I. 295, 77 A. 145, Ann. Cas. 1912B, 65.

18 Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630.

See generally FISH AND FISHERIES [Also 11 R. C. L. p. 1042, § 29].

19 Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751, 6 L.R.A.(N.S.) 143; Re McGee, 105 Kan. 574, 185 P. 14, 8 A.L.R. 831; Board of Health v. Kollman, 156 Ky. 351, 160 S. W. 1052, 49 L.R.A.(N.S.) 354; Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396, 156 Ky. 222, 159 S. W. 971, 160 S. W. 942, 48 L.R.A.(N.S.) 667; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Annotation: 8 A.L.R. 836; 79 L. ed. 523; Ann. Cas. 1913E, 1000.

See HEALTH [Also 12 R. C. L. p. 1271, §§ 10 et seq.].

Delegation of power to a board of health to regulate the sale of milk has been consistently upheld. See FOOD [Also 11 R. C. L. p. 1109, §§ 17 et seq.].

20 Fox v. Mohawk & H. River Humane Soc. 165 N. Y. 517, 59 N. E. 353, 51 L.R.A. 681, 80 Am. St. Rep. 767.

1 Annotation: 32 A.L.R. 1406; L.R.A. 1915E, 168.

See also CEMETERIES, Vol. 10, p. 488, § 5.

2 State Racing Commission v. Latonia Agri. Asso. 136 Ky. 173, 123 S. W. 681, 25 L.R.A.(N.S.) 905.

3 State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996.

See generally PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 353, §§ 3 et seq.].

4 State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705, 95 A.L.R. 1416.

5 Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897.

6 State v. Foutch, 155 Tenn. 476, 295 S. W. 469, 54 A.L.R. 725.

See DRUGS AND DRUGGISTS [Also 9 R. C. L. p. 701, § 6].

7 People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L.R.A. 775; Walker v. Towle, 156 Ind. 639, 59 N. E. 20, 53 L.R.A. 749; State v. Frear, 146 Wis. 291, 131 N. W. 832, 34 L.R.A.(N.S.) 480.

Annotation: Ann. Cas. 1913B, 1008.

See also CIVIL SERVICE, Vol. 10, p. 925, § 5.

8 State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Annotation: Ann. Cas. 1918E, 479.

9 See BANKS, Vol. 7, p. 34, § 14.

10 Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A.1918E, 190; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663.

And see DRAINS AND SEWERS [Also 9 R. C. L. p. 642, § 31].

11 Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 S. Ct. 152.

Annotation: 79 L. ed. 528, 573.

12 Posey v. Board of Education, 199 N. C. 306, 154 S. E. 393, 70 A.L.R. 1306.

See SCHOOLS [Also 24 R. C. L. p. 568, § 13; p. 574, §§ 22 et seq.; p. 633, § 92].

13 People v. Roth, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912A, 100; Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254.

See CARRIERS, Vol. 9, p. 462, § 54.

14 See supra, §§ 180 et seq.

15 As to the extent of the right to adopt rules and regulations, see supra, § 240.

legislative will expressed in statutory form is carried out by the persons or corporations over whom such board may be given administrative power. Boards and commissions of this character do not exercise any of the powers delegated to the legislature. They do not make any laws. They merely find the existence of certain facts, and to these findings of fact the law enacted by the legislature is applied and enforced.[16]

As in the case of other executive officers administrative boards may be given the power to perfect the details of a plan the general outlines of which have been laid down in a statute of the legislature.[17] Thus, it has been held that legislative power is not improperly conferred on a commission by a statute which authorizes it to select schoolbooks and to perfect the details of the general plan of providing all schools with such books and gives to the commission and the governor the authority to announce when the details have been arranged so that the law may be put into operation.[18] Nor is such power unlawfully delegated by a statute providing for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character,[19] or by a statute under which motion picture films may not be exhibited within the state unless they have first been examined by the superintendent of public instruction and approved as moral and instructive, and not tending to debase or corrupt the morals, his disapproval being reviewable by a commission consisting of the governor, attorney general, and secretary of state.[20]

Many such administrative bodies or commissions now exist, and with the increasing complexity of modern government they seem likely to increase rather than diminish. A few examples are boards of health, boards of equalization, railroad rate commissions, and public utility commissions.[1] Similarly, broad

16 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 S. Ct. 436; Sproles v. Binford (D. C.) 52 F. (2d) 730, citing R. C. L.; School Dist. v. Hunnicutt (D. C.) 51 F. (2d) 528 (affirmed in 283 U. S. 810, 75 L. ed. 1428, 51 S. Ct. 653) citing R. C. L.; Sears, R. & Co. v. Federal Trade Commission (C. C. A. 7th) 258 F. 307, 6 A.L.R. 358; Alabama Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; Snow v. Riggs, 172 Ark. 835, 290 S. W. 591, citing R. C. L.; Fillmore Union High School Dist. v. Cobb, 5 Cal. (2d) 26, 53 P. (2d) 349, citing R. C. L.; Stanislaus County Dairymen's Protective Asso. v. Stanislaus County, — Cal. App. (2d) —, 58 P. (2d) 706, citing R. C. L.; Chambers v. McCollum, 47 Idaho, 74, 272 P. 707, citing R. C. L.; State ex rel. Court of Industrial Relations v. Howat, 107 Kan. 423, 191 P. 585 (writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277) citing R. C. L.; Louisville, H. & St. L. R. Co. v. Lyons, 155 Ky. 396, 159 S. W. 971, 48 L.R.A.(N.S.) 667; Tighe v. Osborne, 150 Md. 452, 133 A. 465, 46 A.L.R. 80; Re Consolidated Freight Co. 265 Mich. 340, 251 N. W. 431, citing R. C. L.; Ex parte Lewis, 328 Mo. 843, 42 S. W. (2d) 21, citing R. C. L.; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; State ex rel. Hughes v. Milhollan, 50 N. D. 184, 195 N. W. 292, citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Monroe v. Withycombe, 84 Or. 328, 165 P. 227, citing R. C. L.; State ex rel. Melton v. Nolan, 161 Tenn. 293, 30 S. W. (2d) 601, citing R. C. L.; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367 (affirmed in — Tex. —, 98 S. W. (2d) 781) citing R. C. L.; Tuttle v. Wood (Tex. Civ. App.) 35 S. W. (2d) 1061, citing R. C. L.; State ex rel. Atwood v. Johnson, 170 Wis. 218, 175 N. W. 589, 7 A.L.R. 1617.

For general principles relating to ascertainment of facts by officers, see supra, § 235.

17 See supra, § 240.

18 Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 Ann. Cas. 270; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L.R.A. 167.

19 Mutual Film Co. v. Industrial Commission, 236 U. S. 247, 59 L. ed. 561, 35 S. Ct. 393; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296.

Annotation: 64 A.L.R. 505–507; 79 L. ed. 553.

20 Mutual Film Corp. v. Hodges, 236 U. S. 248, 59 L. ed. 561, 35 S. Ct. 393.

1 Hopper v. Oklahoma County, 43 Okla.

powers in ascertaining wages and hours of employment of women may be delegated to a commission,[2] and such powers granted to parole boards[3] and highway commissions[4] have been sustained.

Constitutional provisions vesting all judicial power in matters of law or equity in certain courts do not necessarily prohibit such boards from conducting hearings[5] or from exercising quasi-judicial powers.[6] One court has stated that conferring such powers on a commission does not violate the constitutional distributive clause since that provision does not require an absolute separation of functions, but permits the functions of an administrative officer or body to be to a large extent judicial and regulative in character.[7]

An administrative board is not necessarily using judicial powers if it exercises discretion.[8] For example, the ascertainment and determination of qualifications to practice medicine by a board of medical examiners appointed for that purpose do not constitute the exercise of a power which exclusively belongs to the judicial department of the government.[9] The same principle sanctions statutes vesting state administrative boards with supervisory powers over various professions and businesses, such as the power to revoke the licenses to practice of those engaged in such businesses or professions, for both general and specific reasons.[10]

Hearings before such commissions as have been herein referred to vary considerably from judicial hearings. Thus, charges before boards need not be stated with the technical nicety or formal exactness required of pleadings in the courts, nor are the proceedings before the board required to conform in every respect to that controlling in strictly judicial proceedings.[11] Furthermore, administrative boards need not be required to act on sworn evidence, nor are they bound to act only after a hearing or to give a hearing to those asking for one. It has been said by one court that their action may be made as final as the action of the legislature in enacting a statute.[12]

288, 143 P. 4, L.R.A.1915B, 875; Borgnis v. Falk Co. 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489.

For other examples, see supra, § 241.

2 Wiliams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217.

Annotation: 24 A.L.R. 1260; 90 A.L.R. 837; 79 L. ed. 531.

3 Woods v. State, 130 Tenn. 100, 169 S. W. 558, L.R.A.1915F, 531.

Annotation: L.R.A.1915F, 533.

4 State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274.

Annotation: 86 A.L.R. 283.

5 State v. Thorne, 112 Wis. 81, 87 N. W. 797, 55 L.R.A. 956.

6 Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 50 L.R.A. 747, 87 Am. St. Rep. 918.

Annotation: 121 Am. St. Rep. 293.

Under the provisions of a statute that witnesses refusing or neglecting to appear and testify before the board of railroad commissioners shall be subject to the penalties applicable to witnesses neglecting or refusing to appear and testify before the court, imposing a penalty on persons wilfully obstructing the commissioners in the discharge of their duties by refusing to furnish information, and imposing a penalty on persons failing within a reasonable time to obey a final order or decree of the board, the penalties mentioned are enforceable in the courts in the same manner as other penalties prescribed by statute. Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

7 Ibid.

8 Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

For general principle as to the exercise of discretionary powers by administrative officers, see supra, § 231.

9 Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 25 S. Ct. 390.

10 Green v. Blanchard, 138 Ark. 137, 211 S. W. 375, 5 A.L.R. 84 (dentistry); Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897 (optometry); State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705, 95 A.L.R. 1416 (dentistry); Klafter v. State Examiners, 259 Ill. 15, 102 N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221 (architecture).

Annotation: 5 A.L.R. 94 et seq., s. 79 A.L.R. 323 et seq. (physicians, surgeons, or dentists); 54 A.L.R. 403 (physicians and surgeons employing advertising); 98 A.L.R. 905, 910, 912 (optometry).

See also PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 365, § 12].

11 State ex rel. Williams v. Whitman, 116 Fla. 196, 156 So. 705, 95 A.L.R. 1416.

12 Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630.

§ 243. —Public Utilities Commissions.—One of the most important types of administrative boards[13] consists of public utilities commissions empowered to regulate those engaged in various occupations affected with a public interest.[14] Since railroads form perhaps the most prominent class of such corporations, state railway commissions instead of public utilities commissions are found in some of the states.[15] The power to prescribe what the charges shall be for services rendered in the conduct of a business impressed with a public interest is a legislative and not a judicial matter.[16] Accordingly, such power is vested in the legislature and may be exercised by it either directly or through some appropriate agency,[17] such as public utilities commissions,[18] state railway commissions,[19] and equivalent bodies known under other names.[20] Statutes creating and vesting power as to fixing and regulating charges in state railway or public utilities commissions are usually considered as constitutional[1] and therefore as being valid delegations of such power.[2] Nevertheless, the ultimate power of the courts is not interfered with by a statute requiring the submission to the public service commission, in the first instance, of the question of the reasonableness of a change of rates by a street railway company, if the record of the commission is subject to review by the courts. St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, 103 A. 287, 5 A.L.R. 20.

13 See supra, § 242.

14 Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Tuttle v. Wood (Tex. Civ. App.) 35 S. W. (2d) 1061, citing R. C. L.; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

Annotation: 14 Ann. Cas. 614.

As to what businesses are affected with a public interest, see infra, § 293.

15 Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 S. Ct. 602; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, 83 S. E. 946, L.R.A.1916E, 358; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Annotation: 10 L.R.A.(N.S.) 250.

16 Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 S. Ct. 48; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 S. Ct. 330; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 S. Ct. 148; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 S. Ct. 67; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 S. Ct. 585, 11 Ann. Cas. 398; McChord v. Louisville & N. R. Co. 183 U. S. 483, 46 L. ed. 289, 22 S. Ct. 165; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 S. Ct. 896; Lenawee County Gas & E. Co. v. Adrian, 209 Mich. 52, 176 N. W. 590, 10 A.L.R. 1328; Nebraska Teleph. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L.R.A. 113; State ex rel. Board of Transportation v. Sioux City, O. N. & W. R. Co. 46 Neb. 682, 65 N. W. 766, 31 L.R.A. 47.

Annotation: Ann. Cas. 1913E, 1097.

17 Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 S. Ct. 48; Grand Trunk W. R. Co. v. Railroad Commission, 221 U. S. 400, 55 L. ed. 786, 31 S. Ct. 537; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 S. Ct. 585, 11 Ann. Cas. 398; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 393, 394, 38 L. ed. 1014, 1022, 1023, 14 S. Ct. 1047; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 S. Ct. 334, 338, 1191; Madison v. Madison Gas & E. Co. 129 Wis. 249, 108 N. W. 65, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819.

18 Chicago Motor Coach Co. v. Chicago, 337 Ill. 200, 169 N. E. 22, 66 A.L.R. 834; Chicago R. Co. v. Commerce Commission, 336 Ill. 51, 167 N. E. 840, 67 A.L.R. 938; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 55 S. E. 572, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124; United Fuel Gas Co. v. Public Serv. Commission, 103 W. Va. 306, 138 S. E. 388, 52 A.L.R. 1104.

Annotation: 62 Am. St. Rep. 291.

19 Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 S. Ct. 48; Reagan v. Mercantile Trust Co. 154 U. S. 413, 418, 38 L. ed. 1028, 1030, 14 S. Ct. 1060, 1062; Reagan v. Farmer's Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, 33 L. ed. 985, 10 S. Ct. 473; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 S. Ct. 462, 702; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 S. Ct. 47; Consumers' League v. Colorado & S. R. Co. 53 Colo. 54, 125 P. 577, Ann. Cas. 1914A, 1158; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250.

20 Great Northern R. Co. v. Washington, 300 U. S. 154, 81 L. ed. 573, 57 S. Ct. 397, rehearing denied in 300 U. S. 686, 81 L. ed. 888, 57 S. Ct. 504; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; State v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662; Sims v. State, 80 Okla. 254, 196 P. 132, 23 A.L.R. 1475.

1 Columbus Gas & Fuel Co. v. Public Utilities Commission, 292 U. S. 398, 78 L. ed. 1327, 54 S. Ct. 763, 91 A.L.R. 1403; Los Angeles Gas & E. Corp. v. California R. Commission, 289 U. S. 287, 77 L. ed. 1180,

less, to prevent the conferring upon an administrative agency of authority to fix rates for public service from being a mere delegation of legislative power, and therefore void, the legislature must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions with which the agency must substantially comply to validate its action.[3]

The constitutional power to delegate to commissions the determination of the facts upon which public service corporations may be permitted to issue securities, with authority to approve or deny an application for such an issuance, dependent upon the commission's findings as to whether the purposes and other conditions are such as are prescribed by law, is well settled.[4] The legislature may also delegate to the commission the power to prescribe rules and regulations as to stations, rights of way, tracks, crossings,[5] and the abolition of grade crossings.[6]

Many wide powers have been conferred on such commissions. Thus, in addition to rate-making powers and allied duties,[7] Congress may authorize the Interstate Commerce Commission to investigate commerce with power to summon witnesses, get books, etc.;[8] to determine the order of purposes for which coal may be shipped in interstate commerce in case of emergency;[9] to fix requirements for drawbars of uniform height under the safety appliance laws;[10] and to prescribe a uniform system of accounting and bookkeeping for the carriers subject to the act authorizing the commission, even though such uniformity requirements may control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce.[11]

53 S. Ct. 637; United R. & Electric Co. v. West, 280 U. S. 234, 74 L. ed. 390, 50 S. Ct. 123; Chicago & N. W. R. Co. v. Dey (C. C.) 35 F. 866, 1 L.R.A. 744; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L.R.A. 141, 41 Am. St. Rep. 278; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 83 N. E. 693, 18 L.R.A.(N.S.) 713, 14 Ann. Cas. 606; State ex rel. Hudson v. Carter, 167 Okla. 32, 27 P. (2d) 617, 91 A.L.R. 1497; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A. 1915C, 287, Ann. Cas. 1913D, 78; Hotel Pfister v. Wisconsin Teleph. Co. 203 Wis. 20, 233 N. W. 617, 73 A.L.R. 1190.

2 J. W. Hampton Jr. & Co. v. United States, 276 U. S. 394, 72 L. ed. 624, 48 S. Ct. 348; Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51; Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 57 L. ed. 1248, 33 S. Ct. 820; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 53 L. ed. 186, 29 S. Ct. 55; McWhorter v. Pensacola & A. R. Co. 24 Fla. 417, 5 So. 129, 2 L.R.A. 504, 12 Am. St. Rep. 220; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; State Public Utilities Commission ex rel. Mitchell v. Chicago & W. T. R. Co. 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; State ex rel. Toledo v. Cooper, 97 Ohio St. 86, 119 N. E. 253, citing R. C. L.; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; Trimmier v. Carlton, 116 Tex. 572, 296 S. W. 1070, citing R. C. L.; Peterson v. Grayce Oil Co. (Tex. Civ. App.) 37 S. W. (2d) 367, citing R. C. L. (affirmed in — Tex. —, 98 S. W. (2d) 781); Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1915C, 574; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Benwood v. Public Serv. Commission, 75 W. Va. 127, 83 S. E. 295, L.R.A.1915C, 261; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L.R.A.(N.S.) 821.

Annotation: 79 L. ed. 509, 513; 18 L.R.A. (N.S.) 713; Ann. Cas. 1917C, 58, 59.

The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. ed. 124, 43 S. Ct. 51.

3 Ibid.

4 Annotation: 41 A.L.R. 891.

For details see PUBLIC UTILITIES AND SERVICES.

5 Annotation: 79 L. ed. 517.

For detailed discussion see RAILROADS [Also 22 R. C. L. p. 783, § 39].

6 Annotation: 79 L. ed. 966.

7 See CARRIERS, Vol. 9, p. 469, §§ 61 et seq.

8 Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125.

9 Avent v. United States, 266 U. S. 127, 69 L. ed. 202, 45 S. Ct. 34.

Annotation: 79 L. ed. 513.

10 St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616.

Annotation: 79 L. ed. 511.

11 Kansas City S. R. Co. v. United States, 231 U. S. 423, 58 L. ed. 296, 34 S. Ct. 125, 52 L.R.A.(N.S.) 1; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 56 L. ed. 729, 32 S. Ct. 436.

Annotation: 79 L. ed. 510.

There are limits beyond which the powers of public utilities commissions cannot be enlarged. For example, it has been held that a statute which attempts to authorize a state railroad commission with entire powers, in its judgment, to allow an increase in the capital stock of railroad corporations for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it, is unconstitutional as delegating to the commission legislative power.[12] Similarly, an act creating a court of visitation, giving it jurisdiction to try and determine all questions as to what are reasonable freight rates and switching charges with power to establish rates for the future, apportion charges between connecting carriers, require the construction and maintenance of depots, and make other regulations for the operation of railroads, has been held likewise unconstitutional and void as an attempt to confer legislative and administrative power upon a judicial tribunal.[13] If the powers granted are too broad, the statute may be invalid because it violates constitutional guaranties. Thus, a state statute authorizing an administrative board, in the interest of the public, to fix the hours of labor in industries relating to food, clothing, and fuel whenever a controversy arises between the employers and employees, which must be observed under penalty, to avoid interruption of production, and which is merely a part of a system of compulsory arbitration for the settlement of labor disputes in such industries, violates the provision of the Federal Constitution forbidding the deprivation of liberty without due process of law.[14]

§ 244. Delegation of Power to Create Crimes.—The legislature cannot delegate to a board or to an executive officer the power to declare what acts shall constitute a criminal offense.[15] It is competent for it, however, to authorize a commission to prescribe duties on which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law.[16] There are numerous cases in which the courts have sustained statutes authorizing administrative officers to promulgate rules on a specified subject and providing that a violation of such rules or orders should constitute a misdemeanor, punishable as provided in the statute.[17] Nevertheless, where a statute does not provide that the violation of regulations shall amount to a criminal offense, the regulations themselves are ineffectual to create such offense. There must

12 State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250.

13 State v. Johnson, 61 Kan. 803, 60 P. 1068, 49 L.R.A. 662.

14 Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441.

15 State v. Anklam, 43 Ariz. 362, 31 P. (2d) 888, citing R. C. L.; Ex parte McNulty, 77 Cal. 164, 19 P. 237, 11 Am. St. Rep. 257; People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L.R.A. 751; Com. v. Koneff, 22 Pa. D. & C. 515, citing R. C. L.; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

Annotation: 65 A.L.R. 527.

16 United States v. Shreveport Grain & Elevator Co. 287 U. S. 77, 77 L. ed. 175, 53 S. Ct. 42; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 S. Ct. 444; Standard Oil Co. v. Limestone County, 220 Ala. 231, 124 So. 523, citing R. C. L.; State v. Anklam, 43 Ariz. 362, 31 P. (2d) 888, citing R. C. L.; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 47 So. 969, 32 L.R.A.(N.S.) 639; Com. v. Koneff, 22 Pa. D. & C. 515, citing R. C. L.; Tuttle v. Wood (Tex. Civ. App.) 35 S. W. (2d) 1061, citing R. C. L.; Ex parte Leslie, 87 Tex. Crim. Rep. 476, 223 S. W. 227, citing R. C. L.

Annotation: 32 L.R.A.(N.S.) 639.

17 Avent v. United States, 266 U. S. 127, 69 L. ed. 202, 45 S. Ct. 34; McKinley v. United States, 249 U. S. 397, 63 L. ed. 668, 39 S. Ct. 324; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 S. Ct. 444; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751, 6 L.R.A.(N.S.) 143; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440, 26 L.R.A. 484, 47 Am. St. Rep. 525.

Annotation: 79 L. ed. 491.

in all cases be statutory authority for declaring that an act amounts to a crime,[18] and in addition the penalty must be fixed by the legislature itself.[19]

In a case where the statute itself prescribes punishment for violation of a regulation of a board or commission, it cannot be said that it is unconstitutional on the theory that legislative power to create crimes is delegated to such a body.[20] An illustration is the holding that the power delegated to the Secretary of Agriculture by the provisions of the forest reserve acts, making criminal the violation of the rules and regulations covering forest reservations made and promulgated by him under authority of such statutes, is constitutional.[1] Similarly, Congress having adopted restrictions on the keeping or setting up of houses of ill fame in the vicinity of places where military forces of the United States are situated can leave the details to the regulation of the Secretary of War and provide for the punishment of those who violate the restrictions.[2] It can also constitutionally empower the Secretary of Commerce and Labor to enforce, without invoking the judicial power, the penalty imposed for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, when the official medical examination at the port of arrival discloses that such alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made as the statute requires.[3]

VIII. POLICE POWER

A. General Considerations

1. Source

§ 245. Generally.—The police power is an attribute of sovereignty[4] and a

[18] United States v. L. Cohen Grocery Co. 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 A.L.R. 1045; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 S. Ct. 444; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 S. Ct. 764; Standard Oil Co. v. Limestone County, 220 Ala. 231, 124 So. 523, citing R. C. L.; Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789, citing R. C. L.; Stephensen v. Wood (Tex. Civ. App.) 35 S. W. (2d) 794, citing R. C. L.

[19] Annotation: 79 L. ed. 492.

[20] Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 S. Ct. 444; State v. Anklam, 43 Ariz. 362, 31 P. (2d) 888, citing R. C. L.; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751, 6 L.R.A.(N.S.) 143; Com. v. Koneff, 22 Pa. D. & C. 515, citing R. C. L.; Ex parte Leslie, 87 Tex. Crim. Rep. 476, 223 S. W. 227, citing R. C. L.

Annotation: 6 L.R.A.(N.S.) 143.

[1] Light v. United States, 220 U. S. 523, 55 L. ed. 570, 31 S. Ct. 485; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 S. Ct. 480; State v. Anklam, 43 Ariz. 362, 31 P. (2d) 888, citing R. C. L.; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Com. v. Koneff, 22 Pa. D. & C. 515, citing R. C. L.

Annotation: 79 L. ed. 541.

[2] McKinley v. United States, 249 U. S. 397, 63 L. ed. 668, 39 S. Ct. 324.

Annotation: 79 L. ed. 578.

[3] International Mercantile Marine Co. v. Stranahan, 214 U. S. 344, 53 L. ed. 1024, 29 S. Ct. 678, 16 Ann. Cas. 1222; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 S. Ct. 671.

[4] Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; Miller v. Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L.R.A. 187, 46 Am. St. Rep. 221; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A. (N.S.) 792, Ann. Cas. 1914A, 1177; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; Franklin County v. Public Utilities Commission, 107 Ohio St. 442, 140 N. E. 87, 30 A.L.R. 429; Cincinnati v. Harth, 101 Ohio St. 344, 128 N. E. 263, 13 A.L.R. 308; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A.L.R. 705, overruled on another point in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342; Mirick v. Gims, 79 Ohio St. 174, 86 N. E. 880, 20 L.R.A.(N.S.) 42; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A.(N.S.) 1147, 125 Am. St. Rep. 818; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Bohn v. Salt Lake City, 79 Utah, 121, 8 P. (2d) 591, 81 A.L.R. 215; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; Virginia-Western Power Co. v. Clifton Forge (Virginia Western Power Co. v. Com.) 125 Va. 469, 99 S. E. 723, 9 A.L.R. 1148, writ of certiorari denied in 251 U. S. 557, 64 L. ed. 413, 40 S. Ct. 179; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

necessary attribute of every civilized government.[5] It is a general term used to express the particular right of a government which is inherent in every sovereignty.[6] Consequently, it is inherent in the states of the American Union,[7]

"The police power is an indispensable prerogative of sovereignty." Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460.

"The police power . . . might be deemed sovereignty rather than a mere attribute of sovereignty." Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government. State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

[5] East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; State v. Yarboro, 194 N. C. 498, 140 S. E. 216, citing R. C. L.; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

[6] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 S. Ct. 565; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; per Taney, Ch. J., Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; Birmingham v. Hood-McPherson Realty Co. 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140; Denver v. Denver & R. G. R. Co. 63 Colo. 574, 167 P. 969, L.R.A.1918D, 659, affirmed in 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Cochran v. Prestin, 108 Md. 220, 70 A. 113, 23 L.R.A.(N.S.) 1163; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Kansas City v. Holmes, 274 Mo. 159, 202 S. W. 392, L.R.A. 1918D, 1016; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; Carty v. Winooski, 78 Vt. 104, 62 A. 45, 2 L.R.A. (N.S.) 95, 6 Ann. Cas. 436; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

[7] Pierce v. New Hampshire, 5 How. (U. S.) 554, 12 L. ed. 279; Atkinson, Kier Bros. Spicer Co. v. Industrial Commission, 35 Ariz. 48, 274 P. 634, citing R. C. L.; Ex parte Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327,

possessed by every one of them as sovereign,[8] and is not a grant derived from or under any written Constitution.[9] In connection with this latter principle,

L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; State v. Gurry, 12 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915C, 957; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918E, 542; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.: State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A. (N.S.) 1287, 130 Am. St. Rep. 671; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; State v. Broken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; State v. Yarboro, 194 N. C. 498, 140 S. E. 216, citing R. C. L.; State v. Boone, 84 Ohio St. 346, 95 N. E. 924, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A. 1917C, 944, Ann. Cas. 1916A, 217; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.: State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92), citing R. C. L.: Bohn v. Salt Lake City, 79 Utah. 121, 8 P. (2d) 591, 81 A.L.R. 215; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; Virginia-Western Power Co. v. Clifton Forge (Virginia-Western Power Co. v. Com.) 125 Va. 469, 99 S. E. 723, 9 A.L.R. 1148, writ of certiorari denied in 251 U. S. 557, 64 L. ed. 413, 40 S. Ct. 179; Laughney v. Mayhury, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040;

State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102; State v. Krentzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

[8] East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462), citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[9] Atkinson, Kier Bros. Spicer Co. v. Industrial Commission, 35 Ariz. 48, 247 P. 634, citing R. C. L.; State v. Crowe, 130 Ark. 272, 197 S. W. 4, L.R.A.1918A, 567, Ann. Cas. 1918D, 460; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.: State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A.(N.S.) 1287; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; State v. Yarboro, 194 N. C. 498, 140 S. E. 216, citing R. C. L.; Franklin County v. Public Utilities Commission, 107 Ohio St. 442, 140 N. E. 87, 30 A.L.R. 429; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.: Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Re Guerra, 94 Vt. 1, 110 A. 224,

the point of view has been expressed that the police power is a grant from the people to their governmental agents.[10] It has also been affirmed, however, in discussing the source of the power, that the right of the legislature to exercise the police power is not only not referable to any single provision of the Constitution, but inheres in, and springs from, the nature of our institutions; and so the limitations upon it are those which spring from the same source, as well as those expressly set out in the Constitution.[11] It is very generally regarded not as a delegated, but a reserved, power.[12]

The police power is as old as the civilized governments which exercise it. The states existed before the Constitution of the United States, and they possessed the police power before the adoption of that organic document.[13] Moreover, it has been held many times that the Constitution supposes the pre-existence of the police power, and must be construed with reference to that fact.[14]

The breadth and extent of the police power, covering the exigencies confronting the community,[15] its adaptability,[16] durability, inalienability,[17] and the number of public purposes included in its scope[18] make it a principal pillar of government.[19] It has been stated that the police power in effect sums up the whole power of government, and that all other powers are only incidental and ancillary to the execution of the police power; it is that full final power involved in the administration of law as the means to the attainment of practical justice.[20] Moreover, it has been said that the very existence of government depends on it,[1] as well as the security of the social order, the life and

[10] A.L.R. 1560; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

The police power of the states is not derived from the Constitution of the United States, but is a power existing in them as sovereign states. Armour & Co. v. Augusta, 134 Ga. 178, 67 S. E. 417, 27 L.R.A. (N.S.) 676.

[11] Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

[11] State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

[12] Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A.1917C, 574.

[13] New York v. Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065.

[14] Chicago & N. W. R. Co. v. Illinois Commerce Commission, 326 Ill. 625, 158 N. E. 376, 55 A.L.R. 654; Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L.R.A. 178, 19 Am. St. Rep. 490.

The general police power vested in, although not expressly conferred on, the legislature under written Constitutions is, like a power expressly granted, interpreted in connection with the maxims of Magna Charta and the common law. Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269.

[15] See infra, §§ 251, 253.

[16] See infra, § 253.

[17] See infra, § 254.

[18] See infra, §§ 270 et seq.

[19] 8 Ohio Jur. (Constitutional Law) p. 334, § 230, note 14.
See also infra, § 248.

[20] Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

The police power "is a great power. Without it the purpose of civil government could not be attained. It has more to do with the well-being of society than any other power. Properly exercised, it is a crowning influence. Improperly exercised it would make of sovereign will a destructive despot, superseding and rendering innocuous some of the most cherished principles of constitutional freedom." Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

Powers neither judicial, legislative, nor executive, in the sense in which these terms are employed in discussions of constitutional law, belong to that great residuum of governmental authority, the police power, to be made effective through administrative agencies. Woods v. State, 130 Tenn. 100, 169 S. W. 558, L.R.A.1915F, 531.
See also infra, § 247.

[1] Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92; American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C.

health of the citizen, the enjoyment of private and social life, and the beneficial use of property.[2]

2. Definitions

§ 246. Difficulty.—There have been many attempts to define the police power.[3] It has not, however, received a full and complete definition.[4] The difficulty has been the subject of frequent comment.[5] In fact it has been said that the police power is from its nature incapable of any exact definition or limitation.[6] It is not susceptible of circumstantial precision[7] because none can

551, 152 S. E. 693, citing R. C. L.; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Com. v. Widovich, 295 Pa. 311, 145 A. 295 (writ of certiorari denied in 280 U. S. 518, 74 L. ed. 588, 50 S. Ct. 66) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[2] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

The police power springs from the obligation of the state to protect its citizens and provide for the safety and good order of society and permits reasonable regulation of rights of property in particulars essential to the preservation of the community from injury. Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. ed. 1090, 55 S. Ct. 563, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

[3] Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.

For examples, see infra, § 247.

[4] Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L.R.A.(N.S.) 338; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L.R.A. 768, 46 Am. St. Rep. 390; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 568, 55 A.L.R. 781; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 1139, Ann. Cas. 1917D, 1114; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

[5] Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A. 1918A, 136, Ann. Cas. 1917C, 594; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 S. Ct. 934; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.(N.S.) 652, Ann. Cas. 1915C, 822; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L.R.A. 783; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Conger v. Pierce County, 116 Wash. 27, 18 P. 377, 18 A.L.R. 393; Re O'Neill, 41 Wash. 174, 83 P. 104, 3 L.R.A.(N.S.) 558, 6 Ann. Cas. 869; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

[6] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed.

foresee the ever-changing conditions which may call for its exercise.[8] Moreover, it has been held that these conditions render it inadvisable to define the power accurately.[9]

§ 247. Attempted Definitions.—While it is generally recognized that it is very difficult and practically impossible to give an exact definition of the police power[10] many attempts have been made. Although there is no consensus of opinion in favor of any of them, these definitions are of considerable value as indicating the breadth and scope of this power.[11] The expression "police power" is sometimes used in a very broad sense, including all legislation and almost

394; Birmingham v. Hood-McPherson Realty Co. 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Gundling v. Chicago, 176 Ill. 340, 52 N. E. 44, 48 L.R.A. 230; Rehmann v. Des Moines, 200 Iowa, 286, 204 N. W. 267, 40 A.L.R. 922; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A. (N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790; Dunn v. Com. 105 Ky. 834, 49 S. W 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; State v. Canal & C. R. Co. 50 La. Ann. 1189, 24 So. 265, 56 L.R.A. 287, writ of error dismissed in (U. S.) 44 L. ed. 1221, 20 S. Ct. 1027; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087; Smith v. New England Aircraft Co. 270 Mass. 511, 170 N. E. 385, 69 A.L.R. 300; Bowerman v. Sheehan. 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 448, 249 N. W. 334, 86 A.L.R. 1507; State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 568, 54 A.L.R. 1012, affirmed in 273 U. S. 671, 71 L. ed. 832, 47 S. Ct. 474; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; Jensen v. Southern P. Co. 215 N. Y. 514, 109 N. E. 600, L.R.A.1916A, 403, Ann. Cas. 1916B, 276, reversed on other grounds in 244 U. S. 205, 61 L. ed. 1086, 37 S. Ct. 524, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L.R.A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Big Butte Horse & Cattle Asso. v. Anderson, 133 Or. 171, 289 P. 503, 70 A.L.R. 399; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Ex parte Meckel, 87 Tex. Crim. Rep. 120, 220 S. W. 81, citing R. C. L.; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

[7] Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

[8] Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 42, Ann. Cas. 1918B, 402; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1073; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Re Ten-Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; Ex parte Meckel, 87 Tex. Crim. Rep. 120, 220 S. W. 81, citing R. C. L.

[9] State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643.

Definitions of police power which give its boundaries with precision have not been attempted by any courts. It is wise that it is so because this, like many of the subject matters of the law, is constantly in the process of evolution and development and must be adapted to the social, industrial, and commercial conditions of the times. Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

As to plasticity of police power under changing conditions, see infra, § 253.

[10] See supra, § 246.

[11] See infra, notes 12–19, this section.

every function of civil government.[12] At other times it is used in a somewhat more restricted sense.[13]

Blackstone defines police power as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."[14] Many cases employing the language of Chief Justice Shaw define it as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[15] Judge Cooley says that the police power of a state "embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others," and the courts have quoted this definition with approval many times.[16] Finally, it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large.[17]

It has been stated that the police power is only another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state,[18] and that it comprises that portion of

[12] Dakota Cent. Teleph. Co. v. South Dakota, 250 U. S. 163, 63 L. ed. 910, 39 S. Ct. 502; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Washington v. Atlantic Coast Line R. Co. 136 Ga. 638, 71 S. E. 1066, 38 L.R.A.(N.S.) 867; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610; Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 432, Ann. Cas. 1918B, 402; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27.

[13] Dakota Cent. Teleph. Co. v. South Dakota, 250 U. S. 163, 63 L. ed. 910, 39 S. Ct. 507; Washington v. Atlantic Coast Line R. Co. 136 Ga. 638, 71 S. E. 1066, 38 L.R.A.(N.S.) 867.

[14] Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224, overruled on another point in State v. Baum, 33 La. Ann. 981; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

The police power is that power in government which restrains individuals from transgressing the rights of others and restrains them in their conduct so far as is necessary to protect the rights of all. State v. Dolan, 13 Idaho, 693, 92 P. 995, 14 L.R.A.(N.S.) 1259.

[15] Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Rodemacker v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224, overruled on another point in State v. Baum, 33 La. Ann. 981; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Maryland v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; Hart v. State, 87 Miss. 171, 39 So. 523, N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L.R.A. 854; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 70 N. W. 68, 36 L.R.A. 55, 60 Am. St. Rep. 105.

Annotation: 62 Am. St. Rep. 720.

The term "police power" comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to maintain the public health, comfort, safety, and welfare. Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L.R.A. 270.

The "police power" is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society. People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 715, Ann. Cas. 1917C, 1065.

The police power is the power inherent in the state to prescribe within the limits of the state and Federal Constitutions reasonable regulations necessary to preserve the public order, health, safety, and morals. Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610; Tighe v. Osborne, 150 Md. 452, 133 A. 465, 46 A.L.R. 80, former appeal in 149 Md. 349, 131 A. 801, 43 A.L.R. 819; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.

The police power of the state is the power inherent in every sovereignty to govern men and things, under which power the legislature may, within constitutional limits, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but may prescribe regulations to promote the public health, morals, and safety, and add to the general public convenience, prosperity, and welfare. State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

The police powers are nothing more or less than the powers of government inherent in every sovereignty to govern men and things. Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276.

The police power is the power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state with all of its resources and add to its wealth and prosperity. State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

"The police power is the name given to that inherent sovereignty which it is the right and duty of the government to exercise, whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure, in any respect, such economic conditions as an advancing complex civilization requires." Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 1139, Ann. Cas. 1917D, 1114; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

[16] Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Sifers v. Johnson, 7 Idaho, 798, 65 P. 709, 54 L.R.A. 785, 97 Am. St. Rep. 271; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 30 L. ed. 1187, 7 S. Ct. 1126; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; Shreveport v. Dantes, 118 La. 113, 42 So. 716, 8 L.R.A.(N.S.) 304; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. Scongal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 70 N. W. 68, 36 L.R.A. 55, 60 Am. St. Rep. 105.

The "police power," as that term is commonly employed, may be paraphrased as society's natural right of self-defense, and its definitions and limitations vary with the circumstances calling for its exercise; it comprehends all those general laws and internal regulations necessary to secure the peace, good order, health, and prosperity of the people, and the regulation and protection of property and property rights. McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259.

[17] People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; State v. Yarboro, 194 N. C. 498, 140 S. E. 216, citing R. C. L.

[18] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Allyn's Appeal, 81 Conn. 534, 71 A. 794, 23 L.R.A.(N.S.) 630, 129 Am. St. Rep. 225; Rodemacker v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L.R.A.1915B, 859, Ann. Cas. 1916C, 1274; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; State v. Yarboro, 194 N. C. 498, 140 S. E. 216, citing R. C. L.; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing

the sovereignty of the state which is not surrendered by the terms of the Federal Constitution to the Federal Government.[19]

3. Nature

§ 248. Generally.—With regard to the nature and extent of the police power, it has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government.[20]

The boundary line which divides the police power of the state from the other functions of government is often difficult to discern,[1] but it is distinguishable from taxation[2] and eminent domain[3] and while subject to some of the same tests as are those powers, it is also subject to many different tests of validity and limitations. Thus, in the exercise of the police power the legislature is not hampered by any limitations placed by the Constitution upon the exercise of the taxing power of the legislature.[4]

In spite of the breadth of the police power and a total uncertainty of limitations from any standpoint of standardized definition or all-embracing rigidity,[5] it is undeniably subject to definitive and specific constitutional provisions[6] as well as general constitutional inhibitions;[7] and the fact that it may be exercised for the promotion of the general welfare[8] does not mean that it is unlimited.[9] Moreover, it can only be exercised for those purposes within its scope[10] and for regulation, not competition.[11] The police power, as applied to business activities, is the power to regulate those activities, not to engage in carrying them on,[12] although the state itself may exclusively carry on some enterprises, the entire dealing or engaging in which directly affects the purposes of the police power.[13] Generally speaking, however, if a state chooses to go into the business of buying and selling commodities, even though its right to do so may be conceded as far as the Federal Constitution is concerned, the exercise of the right is not the performance of a governmental function and must find its support in some authority apart from the police power.[14]

§ 249. Determination of Limitations.—The limitations of the police power have never been drawn with exactness.[15] It has been said repeatedly that it is much easier to realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise.[16] Therefore, the limits of the police power of the state have never been defined with precision, and its boundary line cannot be determined by any general formula in advance.[17] Recourse has been had to the gradual process of judicial inclusion and exclusion.[18]

As well stated by Justice Holmes, with regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.[19] This gradual process of determining its limitations is due to the fact that it is simpler to perceive the

R. C. L.; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

Exercisable "police power," in the collective sense, is the sovereign authority exercisable directly, where not expressly or inferentially prohibited, to pass laws regulating, reasonably, all those things which pertain to the public welfare. Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

As to source of police power, see supra, § 245.

19 Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

20 McDonald v. Mabee, 243 U. S. 90, 61 L. ed. 608, 37 S. Ct. 343, L.R.A.1917F, 458; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192, reversing 110 Va. 749, 67 S. E. 376, 19 Ann. Cas. 186; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A. (N.S.) 1087, Ann. Cas. 1915B, 957; Taft v. Shaw, 284 Mo. 531, 225 S. W. 457, citing R. C. L.; People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State v. Lockey, 198 N. C. 551, 152 S. E. 693, citing R. C. L.; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841, citing R. C. L.; Com. v. Widovich, 295 Pa. 311, 145 A. 295 (writ of certiorari denied in 280 U. S. 518, 74 L. ed. 588, 50 S. Ct. 66) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158.

1 Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.

2 See Taxation [Also 26 R. C. L. p. 17, §§ 4 et seq.].

3 See Eminent Domain [Also 10 R. C. L. p. 7, § 3].

4 State v. Anderson, 144 Tenn. 564, 234 S. W. 768, 19 A.L.R. 180.

5 See supra, § 247; infra, § 253.

6 **Where the Constitution of the state declares what the liability of stockholders in corporations shall be,** the legislature cannot justify an increase of such liability as an exercise of the police power. Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861. Annotation: 63 A.L.R. 870, 871.

The right to regulate and control banking business under the police power of the state does not authorize the imposing of a double liability on stockholders in a bank contrary to an express constitutional provision in force at the time of the organization of the bank and the purchase of the stock, limiting the liability of stockholders to the amount of stock subscribed and unpaid. Yoncalla State Bank v. Gemmill, 134 Minn. 334, 159 N. W. 798, L.R.A.1917A, 1223.

7 See infra, § 259.

8 See infra, § 274.

9 State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

10 See infra, §§ 270 et seq.

11 Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857, 45 Am. St. Rep. 454.

12 Ohio v. Helvering, 292 U. S. 360, 78 L. ed. 1307, 54 S. Ct. 725.

13 State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

See generally Intoxicating Liquors [Also 15 R. C. L. p. 267, §§ 21 et seq.].

14 Ohio v. Helvering, 292 U. S. 360, 78 L. ed. 1307, 54 S. Ct. 725.

15 Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 S. Ct. 864; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694; Mirick v. Gims, 79 Ohio St. 174, 86 N. E. 880, 20 L.R.A.(N.S.) 42; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

16 Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A. (N.S.) 1087, Ann. Cas. 1915B, 957; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; State v. Kefines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Smith v. Spokane, 55 Wash. 219, 104 P. 249, 19 Ann. Cas. 1220.

17 Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.

18 Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.

19 Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487.

existence of the police power[20] and to determine whether a particular case comes within the scope of the power than to give a definite rule which will be applicable to all cases.[1] The courts have been unable or unwilling definitely to circumscribe it,[2] but instead have determined as each case is presented, whether it falls within or without the appropriate limits.[3]

§ 250. Sic Utere Tuo ut Alienum Non Lædas.—The police power to a large extent rests on the maxim "sic utere tuo ut alienum non lædas."[4] The police

[20] Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100.

[1] Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.; Big Butte Horse & Cattle Asso. v. Anderson, 133 Or. 171, 289 P. 503, 70 A.L.R. 399; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603.

Annotation: 104 Am. St. Rep. 638.

[2] Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927.

[3] People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460.

The validity of police regulations must depend on the circumstances of each case and the character of the regulations, for the purpose of determining whether they are arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 43 A.L.R. 651.

[4] Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L.R.A. (N.S.) 338; Denver v. Denver & R. G. R. Co. 63 Colo. 574, 167 P. 969, L.R.A.1918D, 659, affirmed in 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Denver v. Frueauff, 39 Colo. 20, 88 P. 389, 7 L.R.A.(N.S.) 1131, 12 Ann. Cas. 521; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; Lemont v. Jenks, 197 Ill. 363, 64 N. E. 362, 90 Am. St. Rep. 172; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L.R.A.1915B, 859, Ann. Cas. 1916C, 1274; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Kansas City v. Holmes, 274 Mo. 159, 202 S. W. 392, L.R.A.1918D, 1016; State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; Eccles v. Ditto, 23 N. M. 235, 167 P. 726, L.R.A.1918B, 126; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; State v. Lawing, 164 N. C. 492, 80 S. E. 69, 51 L.R.A.(N.S.) 62; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.; Gant v. Oklahoma City, 150 Okla. 86, 6 P. (2d) 1065, 86 A.L.R. 794, appeal dismissed in 284 U. S. 594, 76 L. ed. 512, 52 S. Ct. 203; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841 (concurring opinion of Hunt, J.) citing R. C. L.; Big Butte Horse & Cattle Asso. v. Anderson, 133 Or. 171, 289 P. 503, 70 A.L.R. 399; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Ex parte

power is the function of the government by which this maxim is enforced.[5] Not only is it one of the objects of government to impose that degree of restraint on individual action which is required for the reasonable enjoyment of all in their respective rights,[6] but furthermore it is the duty of each citizen to use his property and exercise his rights and privileges with due regard to the personal and property rights of others. This duty is the first and most important obligation entering into the social compact, although it involves restrictions upon the so-called natural rights of individuals.[7]

It has been said that nearly every problem involved in the police power finds its solution in the application of the principle embodied in the maxim that everyone must so use his own property as not to injure the rights of others,[8] and that this principle should therefore be observed in the exercise of the police power.[9]

§ 251. Salus Populi and the Law of Necessity.—Another principle involved in the police power is expressed by the well-known maxim, "salus populi est suprema lex."[10] It has been said that this maxim is the foundation principle of all civil government[11] and that for ages it has been a ruling principle of jurisprudence.[12]

McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[5] Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L.R.A.1915B, 859, Ann. Cas. 1916C, 1274; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841 (concurring opinion of Hunt, J.) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[6] Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841 (concurring opinion of Hunt, J.) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[7] Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

[8] Coca Cola Bottling Co. v. Mosby, 289 Mo. 462, 233 S. W. 446, citing R. C. L.; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841 (concurring opinion of Hunt, J.) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345.

[9] Sings v. Joliet, 237 Ill. 300, 86 N. E. 663, 22 L.R.A.(N.S.) 1128, 127 Am. St. Rep. 323; C. C. Julian Oil & Royalties Co. v. Capshaw, 145 Okla. 237, 292 P. 841 (concurring opinion of Hunt, J.) citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[10] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243, affirming 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161; Butchers' Union S.-H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A. (N.S.) 1087, Ann. Cas. 1915B, 957; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L.R.A. 783; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; State v. Boone, 84 Ohio St. 346, 85 Ohio St. 313, 95 N. E. 924, 97 N. E. 975, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; Big Butte Horse & Cattle Asso. v. Anderson, 133 Or. 171, 289 P. 503, 70 A.L.R. 399; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642.

[11] State v. Hay, 126 N. C. 999, 35 S. E. 459, 49 L.R.A. 588, 78 Am. St. Rep. 691.

The maxim, "salus populi est suprema lex" is more than a mere sentiment. It has become one of the props of the police power and is an elastic mantle whose ample folds cover much municipal legislation

The police power has been described as the law of necessity[13] and as being coextensive with the necessities of the case and the safeguards of public interest.[14] It is the power of self-protection on the part of the community.[15]

Justice Holmes has stated that in a general way the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.[16] This

which finds no other justification. Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A.1915B, 1097, Ann. Cas. 1916C, 280; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216.

12 Jentink v. Lake County, 244 Ill. App. 370, citing R. C. L.; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400.

13 Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969; Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L.R.A. 187, 46 Am. St. Rep. 221; People v. Linde, 341 Ill. 269, 173 N. W. 361, 72 A.L.R. 997; Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; Jentink v. Lake County, 244 Ill. App. 370, citing R. C. L.; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; State v. Starkey, 112 Me. 8, 90 A. 431, Ann. Cas. 1917A, 196; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Westminster Presby. Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A.L.R. 437; State v. Vanhook, 182 N. C. 831, 109 S. E. 65, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A. 1915A, 632, Ann. Cas. 1917A, 760; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; Bungalow Amusement Co. v. Seattle, 148 Wash. 485, 269 P. 1043, 60 A.L.R. 166; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

14 Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 S. Ct. 864; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507, affirmed in 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512.

15 Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969; Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L.R.A. 187, 46 Am. St. Rep. 221; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; State v. Starkey, 112 Me. 8, 90 A. 431, Ann. Cas. 1917A, 196; Rutledge Co-op. Asso. v. Baughman, 153 Md. 297, 138 A. 29, 56 A.L.R. 1042; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Westminster Presby. Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A.L.R. 437; State v. Vanhook, 182 N. C. 831, 109 S. E. 65, citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

16 Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 S. Ct. 560; Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A. 1916C, 278; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A. (N.S.) 792, Ann. Cas. 1914A, 1177; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435; Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 43 A.L.R. 651; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; Laughney v. Maybury, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

general doctrine may be said to furnish the key to what is included within the boundaries of police power; not that a police regulation to be legitimate must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as to suggest, reasonably, necessity for the legislative remedy.[17]

§ 252. —Emergency Police Legislation.—A specific application of the doctrine that the police power is based on public necessity[18] finds its application in statutes which have been passed at different occasions during emergencies to cope with the unusual exigencies arising.[19] The general rule that while emergency does not create power, increase granted power, or remove or diminish the restrictions imposed upon power granted or reserved, emergency may furnish the occasion for the exercise of power[20] applies with full force and effect to police measures.[1] Thus, a limit in time to tide over a passing trouble may justify a law that could not be upheld as a permanent change.[2] It must be considered, however, that an emergency does not automatically lift all constitutional restraints[3] and that a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though it was valid when passed.[4] The latter principle depends strictly upon the facts, and mere failure of the legislature to limit the operation of an emergency statute to a

17 State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

Existence of actual necessity for exercise of the police power is not a condition of the right to exercise it. Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

18 See supra, § 251.

19 Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. ed. 877, 41 S. Ct. 465; Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

As to emergency rent laws, see LANDLORD AND TENANT.

20 See supra, §§ 40, 44.

1 Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, and 96 A.L.R. 312, 826.

2 Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

3 Vanderbilt v. Brunton Piano Co. 111 N. J. L. 596, 169 A. 177, 89 A.L.R. 1080.

Where the legislature, in enacting measures to cope with a social emergency, assumes power which by the Constitution of the state is expressly forbidden to it and is taken forever out of the powers of government of the state, the legislature is prevented by the Constitution from exercising such power, no matter what the emergency may be. State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

4 Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Chastleton Corp. v. Sinclair, 264 U. S. 543, 68 L. ed. 841, 44 S. Ct. 405; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

definite term will not render the law invalid so long as the conditions which justify its passage remain.[5]

The rule is well settled that if emergency statutes are promotive of the public welfare, they are a valid exercise of the police power.[6] The contention is often made that emergency police measures in the nature of moratoria violate that clause of the Federal Constitution forbidding any state to pass laws impairing the obligation of contracts.[7] The general principle arising from the decisions is that such police measures may be valid although temporarily impairing the power to enforce contracts.[8] Conditions may arise in which a temporary restraint of enforcement of a contract may be consistent with the spirit and purpose of the constitutional provision forbidding the impairment of the obligation of contracts and may thus be found to be within the range of the reserved power of a state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by urgent public need produced by economic causes.[9] Thus, the police power may be exercised without violating the true intent of the provision forbidding impairment of the obligation of contracts, in directly preventing by a temporary and conditional restraint the immediate and literal enforcement of a contractual obligation, where vital public interests would otherwise suffer.[10]

In the enactment of emergency police measures, the question as to whether an emergency exists is primarily for the legislature to determine.[11] Such determination, although entitled to great respect, is not conclusive[12] because the courts, in such cases, possess the final authority to determine whether an emergency in fact exists.[13]

§ 253. Plasticity.—The police power of the state, never having been exactly defined or circumscribed by fixed limits,[14] is considered as being capable of development and modification within constitutional limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions.[15] It is very broad and comprehensive[16] and is liberal-

[5] Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[6] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

Annotation: 86 A.L.R. 1539, s. 88 A.L.R. 1519, and 96 A.L.R. 312, 826.

Bank holiday legislation has been recognized by the courts. Annotation: 96 A.L.R. 830. See also BANKS, Vol. 7, p. 279, § 390.

[7] See Vol. 12, Subd. XI.

[8] See Vol. 12, Subd. XI.

[9] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[10] Ibid.

For discussion of the nature and effect of legislative declaration of emergency generally, see supra, § 144.

[11] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[12] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

Annotation: 7 A.L.R. 522, s. 110 A.L.R. 1436.

[13] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507.

[14] See supra, § 246.

[15] Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in

ly understood and applied.[17] The legislature may proceed step by step, condemning that which it deems to be the greatest menace to the health and welfare of the people and leaving further regulation and prohibition for future consideration.[18]

The changing conditions of society may make it imperative for the state to

241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 56, 54 A.L.R. 1012, affirmed in 273 U. S. 671, 71 L. ed. 832, 47 S. Ct. 474; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; Jensen v. Southern P. Co. 215 N. Y. 514, 109 N. E. 600, L.R.A.1916A, 403, Ann. Cas. 1916B, 276, reversed on other grounds in 244 U. S. 205, 61 L. ed. 1086, 37 S. Ct. 524, L.R.A.1918C, 451, Ann. Cas. 1917E, 900; State ex rel. Smith v. Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156) citing R. C. L.; Pontiac Improv. Co. v. Cleveland Metropolitan Park Dist. 104 Ohio St. 447, 135 N. E. 635, 23 A.L.R. 866; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, P.U.R.1919B, 212, 3 A.L.R. 696; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 344, 64 W. L. Bull. 462) citing R. C. L.; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Hyde v. Albert E. Pierce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A. 1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

The police power is necessarily expansive, to meet new conditions or standards. State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

"It is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. . . . There is nothing known to the law that keeps more in step with human progress than does the exercise of this power." Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460.

[16] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; State v. Hyman, 93 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681, writ of error dismissed in (U. S.) 46 L. ed. 1263, 22 S. Ct. 931; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State ex rel. Smith v. Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156) citing R. C. L.; Champaign County v. Church, 62 Ohio St. 318, 57 N. E. 50, 48 L.R.A. 733, 78 Am. St. Rep. 718; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Hyde v. Albert E. Pierce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A. (N.S.) 842; State v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L.R.A. 157, 60 Am. St. Rep. 123.

The police power of a state is as broad and plenary as its taxing power. Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642.

[17] Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

The limits of the police power must necessarily depend in many instances on the common knowledge of the times. People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L.R.A. 178, 88 Am. St. Rep. 534.

[18] State v. Nossaman, 107 Kan. 715, 193 P. 347, 20 A.L.R. 921, writ of error dismissed in 258 U. S. 633, 66 L. ed. 802, 42 S. Ct. 314.

exercise additional powers, and the welfare of society may demand that the state should assume such powers.[19] It is obvious that the tendency is to extend rather than to restrict the police power.[20] Its limits are to be determined with regard to the particular subject of its exercise[1] and its scope, in promoting the public convenience or general prosperity, enlarges correspondingly.[2] Thus, it is the proper function of the legislative department of government in the exercise of the police power to consider the problems and risks that arise from the use of new inventions and endeavor to adjust private rights and harmonize conflicting interests by comprehensive statutes for the public welfare.[3]

Matters under restriction at previous periods of civilized progress are not a testing device into which the adaptable police power may be fitted, and although it is fundamentally true that whatever may be enjoined by a court of equity may by legislation be declared malum prohibitum,[4] the police power is by no means limited to dealing with what were nuisances at common law.[5] On the other hand, what was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.[6] The state may, in the exercise of the power, declare an act or conduct invalid or unlawful which has theretofore been regarded as valid.[7] Furthermore, practices harmless in and of themselves may, from changed circumstances, become the source of evil or may have evil tendencies justifying restrictive legislation.[8] It must also be noticed, however, that a police regulation, although valid when made, may become arbitrary and confiscatory in operation by reason of later events.[9]

The position has been taken that the power itself does not expand, but is of such a nature in its original scope as to correct new evils as they arise. In this connection it has been stated that much confusion is eliminated by pointing out that instead of the police power being expanded to meet new conditions,

[19] Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172; Jones v. State, 17 Ala. App. 444, 85 So. 839, citing R. C. L.; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957, writ of certiorari denied in 218 U. S. 673, 54 L. ed. 1205, 31 S. Ct. 223; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A. (N.S.) 994; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Streich v. Board of Education, 34 S. D. 169,147 S. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

[20] State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607.

[1] Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950.

[2] See also infra, §§ 270, 274.

[3] People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Smith v. New England Aircraft Co. 270 Mass. 511, 170 N. E. 385, 69 A.L.R. 300; Com. v. Kingsbury, 199 Mass. 542, 85 N. E. 848, L.R.A.1915E, 264, 127 Am. St. Rep. 513.

[4] Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49.

[5] Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

[6] Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460.

[7] Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425.

[8] Rast v. Van Deman, & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455.

It is competent in a proper case for the legislature under its general police power to impose a new duty for the protection or safety of the public, the violation of which if it directly and without any intervening cause results in injury or damage, will give rise to a cause of action. Ward v. Ely-Walker Dry Goods Bldg. Co. 248 Mo. 348, 154 S. W. 478, 45 L.R.A.(N.S.) 550.

[9] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Abie State Bank v. Bryan, 282 U. S. 765, 75 L. ed. 690, 51 S. Ct. 252.

the new conditions are, as they arise, brought within the immutable and unchanging principles underlying the power.[10]

The elasticity of the police power has given rise to a judicially recognized theory that the principle of stare decisis has no application to an exercise of this power. Stare decisis is a rule of property. This position is taken because, if it were not, mistaken decisions would destroy that very power of society to protect itself, and a new Constitution would be created by the courts. The courts, however, cannot decide away that which the state itself cannot contract away.[11]

§ 254. Inalienability.—It is a fundamental principle of constitutional law that in matters relating to the police power each successive legislature is of equal authority.[12] A legislative body cannot part with its right to exercise such power; it inherently has authority to use the power again and again, as often as the public interests may require.[13] Hence, one session or body of the legislature may not by any contract with an individual restrain the power of a subsequent legislature to legislate for the public welfare.[14] The governmental power of self-protection cannot be contracted away. Neither can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.[15]

The foregoing principles are embodied in the familiar rule that the state cannot barter or bargain away the right to use the police power[16] or by any

[10] Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475.

[11] Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270.

As to the inability of a state to contract away the police power, see infra, § 254.

[12] State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Board of Education v. Phillips, 67 Kan. 549, 73 P. 97, 100 Am. St. Rep. 475; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

The statement in the text is a particular application of the general rule that no legislative act is binding as a precedent or otherwise on any subsequent legislature, as to which, see STATUTES [Also 25 R. C. L. p. 909, § 162].

[13] East Hartford v. Hartford Bridge Co. 10 How. (U. S.) 511, 13 L. ed. 518; Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[14] Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 S. Ct. 534; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302.

The authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature. White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 43 P. 1028, 31 L.R.A. 828.

[15] Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[16] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 62 L. ed. 124, 38 S. Ct. 35; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 S. Ct. 110; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 65 Conn. 410, 32 A. 953, 29 L.R.A. 367; State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61, citing R. C. L.; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Com. v. Douglass, 100 Ky. 116, 24 S. W. 233, 66 Am. St. Rep. 328, affirmed in 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 456, 54 N. W. 958, 20 L.R.A. 79, 35 Am. St. Rep. 580; St.

contract divest itself of the power to provide for acknowledged objects of legislation falling within the domain of the police power.[17] Accordingly, the

Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; State v. Great Northern R. Co. 100 Minn. 445, 111 N. W. 289, 10 L.R.A.(N.S.) 250; Bank of Oxford v. Love, 111 Miss. 699, 72 So. 133, 8 A.L.R. 894, affirmed in 250 U. S. 603, 63 L. ed. 1165, 40 S. Ct. 22; State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L.R.A. 798; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; Cincinnati v. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A.L.R. 705, overruled on other grounds in United Fuel Gas Co. v. Ironton, 107 Ohio St. 173, 140 N. E. 884, 29 A.L.R. 342; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Annotation: 73 Am. St. Rep. 211.

The state cannot bargain away its right and duty to adopt such measures as it may from time to time deem advisable for the promotion of the health and morals of persons confined in its penal institutions. Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658.

[17] **United States.**—Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 80 L. ed. 943, 56 S. Ct. 611, rehearing denied in 298 U. S. 691, 80 L. ed. 1409, 56 S. Ct. 745; Sanitary Dist. v. United States, 266 U. S. 405, 69 L. ed. 352, 45 S. Ct. 176; Great Northern R. Co. v. Minnesota, 246 U. S. 434, 62 L. ed. 817, 38 S. Ct. 346; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 62 L. ed. 124, 38 S. Ct. 35; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 S. Ct. 534; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243, affirming 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339.

Alabama.—Standard Chemical & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, L.R.A.1918C, 522; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 285, 46 Am. St. Rep. 92; American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90.

Colorado.—Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646.

Illinois.—State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N. E. 338, 52 L.R.A.(N.S.) 192.

Indiana.—Union Traction Co. v. Muncie, 80 Ind. App. 260, 133 N. E. 160, citing R. C. L.

Iowa.—Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 802.

Kansas.—Board of Education v. Phillips, 67 Kan. 549, 73 P. 97, 100 Am. St. Rep. 475.

Kentucky.—South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026, 15 L.R.A. 604, 40 Am. St. Rep. 161.

Louisiana.—Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512.

Maine.—Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

Maryland.—Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658.

Minnesota.—St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.

Missouri.—Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442.

Montana.—Miles City v. State Bd. of Health, 39 Mont. 405, 102 P. 696, 25 L.R.A. (N.S.) 589.

Nevada.—Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747.

North Carolina.—Shelby v. Cleveland Mill & Power Co. 155 N. C. 196, 71 S. E. 218, 35 L.R.A.(N.S.) 488, Ann. Cas. 1912C, 179.

Ohio.—Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696.

Oregon.—State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435.

Pennsylvania.—Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A. (N.S.) 977, Ann. Cas. 1915B, 157.

South Carolina.—Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

Texas.—Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451.

Utah.—Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 173 P. 556, 3 A.L.R. 715.

legislature cannot surrender[18] or limit such powers,[19] either by affirmative action or by inaction,[20] or abridge them by any grant, contract, or delegation whatsoever.[1] In some states it is specifically provided in the state Constitutions that the exercise of the power may never be abridged.[2]

As firmly established as the general rule is the corollary that the discretion of the legislature cannot be parted with any more than the power itself.[3] Thus, the legislative authority cannot redelegate to anyone the ultimate right to

Vermont.—Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

[18] State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Shreveport Traction Co. v. Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[19] Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L.R.A. 69; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Venner v. Chicago City R. Co. 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201; Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 26 A. 510, 20 L.R.A. 126; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; State ex rel. Laclede Gaslight Co. v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L.R.A. 798, affirmed in 170 U. S. 78, 42 L. ed. 955, 18 S. Ct. 505; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Victoria v. Victoria Ice, Light & P. Co. 134 Va. 134, 114 S. E. 92, 28 A.L.R. 562.

[20] Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 698; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

[1] Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339; Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L.R.A. 238, 105 Am. St. Rep. 51; Georgia R. & Power Co. v. Railroad Commission, 149 Ga. 1, 98 S. E. 696, 5 A.L.R. 1; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; People ex rel. New York Electric Lines Co. v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, affirmed in 145 U. S. 175, 36 L. ed. 666, 12 S. Ct. 880; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

The police power can neither be abdicated nor bargained away and is inalienable even by express grant. Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Chicago, St. P. M. & O. R. Co. v. Douglas County, 134 Wis. 197, 114 N. W. 511, 14 L.R.A. 1074.

A charter authorizing the manufacture of animal matter into a fertilizer does not guarantee exemption from the exercise of the police power of the state, when the business becomes a nuisance by reason of the growth of population around the locality. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

The charter of an insurance company does not exempt it from obligation to comply with the subsequently established police regulations of the state, such as those contained in Ohio Rev. Stat. §§ 3654, 3655, requiring insurance companies to make annual statements of their condition. Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. ed. 778, 14 S. Ct. 868.

[2] Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[3] Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 S. Ct. 534; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Standard Chemical & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, L.R.A.1918C, 522; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Board of Education v. Phillips, 67 Kan. 549, 73 P. 97, 100 Am. St. Rep. 475; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

determine when, to what extent, and under what circumstances the police power may properly be exercised in any given case.[4]

These principles apply to the police power delegated to municipal corporations. Thus, the general police power possessed by a city is a continuing power, and is one of which a city cannot divest itself, by contract or otherwise.[5]

4. Which Governmental Agencies May Exercise

§ 255. States.—The police power under the American constitutional system has been left to the states.[6] It has always belonged to them and was not surrendered by them to the general government or directly restricted by the Constitution of the United States.[7] It has repeatedly been held that no provi-

[4] Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

[5] Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 172, 26 S. Ct. 23; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L.R.A. 238, 105 Am. St. Rep. 51; Colorado & S. R. Co. v. Ft. Collins, 52 Colo. 281, 121 P. 747, Ann. Cas. 1913D, 646; Georgia R. & Power Co. v. Railroad Commission, 149 Ga. 1, 98 S. E. 696, 5 A.L.R. 1; State Pub. Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, 125 N. E. 374, citing R. C. L.; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Chicago v. Pennsylvania Co. 252 Ill. 185, 96 N. E. 833, 36 L.R.A. (N.S.) 573, Ann. Cas. 1912D, 400; St. Paul v. Chicago, St. P. M. & O. R. Co. 139 Minn. 322, 166 N. W. 335, citing R. C. L.; State ex rel. St. Paul v. Great Northern R. Co. 134 Minn. 249, 158 N. W. 972, citing R. C. L.; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A.(N.S.) 98, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 689; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175; Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696; Pearson v. Twohy Bros. Co. 113 Or. 230, 231 P. 129, 36 A.L.R. 1113; Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958.

The police power is one which remains constantly under the control of the legislative authority, and a city council can bind neither itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that this rule applies. Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77.

A contract on the part of a municipal corporation not to legislate against the storage of oil and gasoline in a given situation if the public welfare shall require it is not imported from the fact that the removal of such a business to its present site was made at the municipality's request, and such a contract, if made, would have no effect. Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172.

An ordinance providing for grading certain streets, which "shall be forever thereafter considered as the true graduation of the streets so graduated, and be binding upon this corporation and all other persons whatever," does not disable a municipal corporation from subsequently making a change of grade authorized by its charter, since the corporation cannot abridge its own legislative power. Goszler v. Georgetown, 6 Wheat. (U. S.) 593, 5 L. ed. 339.

[6] Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 S. Ct. 470, 16 Ann. Cas. 1066; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 30 L. ed. 1187, 7 S. Ct. 1126; Fry v. State, 63 Ind. 552, 30 Am. Rep. 238; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A. (N.S.) 932, 111 Am. St. Rep. 219; State v. Old Tavern Farm, 133 Me. 468, 180 A. 475, 101 A.L.R. 810; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State ex rel. Smith v. Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156), citing R. C. L.; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; Hyde v. Albert E. Peirce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; Brown v. Board of Education, 106 W. Va. 476, 146 S. E. 389, 64 A.L.R. 297.

Annotation: 28 L. ed. 923.

The Constitution of the United States in declaring that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," affirmatively recognizes the power to pass inspection laws as an existing sovereign right in the states. State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158.

[7] Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 38 S. Ct. 529, 3 A.L.R. 649, Ann. Cas. 1918E, 724; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Phillips v. Mobile, 208 U. S. 472, 52 L. ed. 578, 28 S. Ct. 370; Western Turf. Asso. v. Greenberg, 204

sions of the Federal Constitution and none of the amendments added to that instrument were intended or designed to interfere with the police power of the various states.[8]

Each state has the power therefore to regulate the relative rights and duties of all persons, individuals, and corporations within its jurisdiction for the public convenience and the public good.[9] The only limit to state exercise of power in the enactment of police laws is that they shall not prove repugnant to the provisions of the state or national Constitution.[10]

The provisions of the Federal Constitution, elevating Federal treaties and statutes over state legislation,[11] apply with full force and effect to state police regulations.[12] Thus, the police power of a state cannot be held to embrace a subject confided exclusively to Congress by the United States Constitution.[13]

U. S. 359, 51 L. ed. 520, 27 S. Ct. 384; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; New York v. Miln, 11 Pet. (U.S.) 102, 9 L. ed. 648; State ex rel. Black v. Delaye, 193 Ala. 500, 68 So. 993, L.R.A.1915E, 640; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State ex rel. Smith v. Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156) citing R. C. L.; Durham v. Southern R. Co. 185 N. C. 240, 117 S. E. 17, 35 A.L.R. 1313, affirmed in 266 U. S. 178, 69 L. ed. 231, 45 S. Ct. 51; Glenn v. Southern Exp. Co. 170 N. C. 286, 87 S. E. 136, L.R.A.1918B, 438, writ of error dismissed in 245 U. S. 679, 62 L. ed. 543, 38 S. Ct. 133; Chicago, R. I. & P. R. Co. v. Beatty, 34 Okla. 321, 118 P. 367, 126 P. 736, 42 L.R.A.(N.S.) 984, reversed on another point in 234 U. S. 753, 58 L. ed. 1577, 34 S. Ct. 777; Hyde v. Albert E. Peirce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Com. v. Henry, 110 Va. 879, 65 S. E. 570, 26 L.R.A.(N.S.) 883; Brown v. Board of Education, 106 W. Va. 476, 146 S. E. 389, 64 A.L.R. 297.

The police powers of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which may be most advantageously exercised by the states themselves. Phillips v. Mobile, 208 U. S. 472, 52 L. ed. 578, 28 S. Ct. 370.

As to the effect generally of the Fourteenth Amendment, see infra, § 261.

[8] Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585; Ule v. State, 208 Ind. 255, 194 N. E. 140, 101 A.L.R. 903; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L.R.A. 780, 25 Am. St. Rep. 587; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380.

The framers of the Federal Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government and the instrument which they have given us is not to be so construed. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629.

The Constitution of the United States should not be so construed as to deprive the states of the power to amend their laws in such a way as to make them conform to the wishes of the citizens as they may deem best for the public welfare. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

As to the Fourteenth Amendment particularly, see infra, § 261.

[9] Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; State v. Holm, 139 Minn. 267, 166 N. W. 181, L.R.A.1918C, 304; Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State ex rel. Smith v. Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156) citing R. C. L.; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.; Hyde v. Albert E. Peirce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

The states have full power to regulate within their limits matters of internal police which include whatever will promote the peace, comfort, convenience, and prosperity of their people. Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185.

[10] See infra, § 259.

[11] See supra, §§ 42 et seq.

[12] See cases cited infra, notes 13, 14, this section.

[13] Kuehn v. Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L.R.A. 553.

Nor can it defeat or impair a statute passed by Congress in pursuance of the powers granted to it.[14] The trend, however, is construction avoiding conflict. It is stated generally that constitutional and treaty provisions do not prevent a state from forbidding that which is deemed injurious to its people.[15] The Supreme Court has definitely stated that it should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.[16] For example, the mere fact that an article has been manufactured under the protection of a Federal patent does not prevent the state from regulating its use. The state police power for the protection of the public welfare covers all uses of such patented articles.[17] Furthermore, the police power of the state extends over the Federal public domain, at least where there is no legislation by Congress on the subject.[18]

In accordance with the general principles controlling Federal and state activity over matters as to which an amendment to the United States Constitution grants concurrent power to Congress,[19] such grant by the Eighteenth Amendment to Congress over traffic in intoxicating liquor did not by necessary implication take away the police power of the states over that subject,[20] because in this instance that particular provision of the Eighteenth Amendment modified the provision of Article 6 of the Federal Constitution, which provides that the Constitution and laws passed under it shall be the supreme law of the land.[1]

§ 256. Municipalities.—The general authority of the legislature to enact regulations in the exercise of the police power may, in matters of local concern, be delegated to the appropriate municipal corporation or political subdivision.[2] Since this power resides in the state in its sovereign capacity, it can be possessed and exercised by a municipal corporation, technically speaking, only when delegated to it by the lawmaking power of the state,[3] either expressly or by necessary implication,[4] because from a purely technical standpoint, a municipal corporation has no inherent power to enact police regulations.[5] Nevertheless, the power appears to be impliedly granted to every municipal corporation from the mere fact of its organization as a governmental subdivision.[6] This is particularly true as to such a matter as health.[7] It has

[14] R. M. Rose Co. v. State, 133 Ga. 353, 65 S. E. 770, 36 L.R.A.(N.S.) 443.

[15] Ballock v. State, 73 Md. 1, 20 A. 184, 8 L.R.A. 671, 25 Am. St. Rep. 559.

[16] Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92.

[17] State ex rel. American U. Teleg. Co. v. Bell Teleph. Co. 36 Ohio St. 296, 38 Am. Rep. 583.
Annotation: 29 L.R.A. 791; 5 Ann. Cas. 426.

[18] Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763, 38 S. Ct. 323; Big Butte Horse & Cattle Asso. v. Anderson, 133 Or. 171, 289 P. 503, 70 A.L.R. 399.
Annotation: 70 A.L.R. 411.

[19] See supra, § 176.

[20] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.
For a detailed discussion, see INTOXICATING LIQUORS.

[1] State v. Gauthier, 121 Me. 522, 118 A. 380, 26 A.L.R. 652.

[2] See supra, §§ 223, 224.
For a detailed discussion of the matters involved in this section, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 799, §§ 107 et seq.].

[3] Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L.R.A. 768, 46 Am. St. Rep. 390.

[4] Brown v. Board of Education, 106 W. Va. 476, 146 S. E. 389, 64 A.L.R. 297.

[5] Bohn v. Salt Lake City, 79 Utah, 121, 8 P. (2d) 591, 81 A.L.R. 215.

[6] Sayre v. Phillips, 148 Pa. 482, 24 A. 76, 16 L.R.A. 49, 33 Am. St. Rep. 842.
"By the organization of a city or borough within its borders, the state imparts to its creature, the municipality, the powers necessary to the performance of its functions and to the protection of its citizens in their persons and property. The police power is one of these." Ibid.

[7] Gundling v. Chicago, 176 Ill. 340, 52 N. E. 44, 48 L.R.A. 230, affirmed in 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633.
"The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation." Ibid.

[8] First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L.R.A. 481, 28 Am. St. Rep. 185.

[9] See supra, § 17.

[10] Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760; Ohio Const. art. 18, § 3. See 8 Ohio Jur. pp. 311, 312, 345 et seq.

[11] Brownback v. North Wales, 194 Pa. 609, 45 A. 660, 49 L.R.A. 446; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760.
As to municipal regulations generally, see infra, § 307.

[12] See supra, § 254.

[13] United States v. Dewitt, 9 Wall. (U. S.) 41, 19 L. ed. 593; Woods v. Carl, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas. 423; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 30 L. ed. 1187, 7 S. Ct. 1126; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.
Annotation: 28 L. ed. 923.

[14] Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 S. Ct. 470, 16 Ann. Cas. 1066; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.
Domestic relations are regulated by the states, not by the Federal Government and they are regulated not on the theory of property, but rest fundamentally on the inherent police power of each of the states. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L.R.A.1918E, 587.
The power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the National Government. Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A. 1916C, 278.

[15] Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

[16] Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 S. Ct. 934; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 S. Ct. 454; New Orleans Gaslight Co. v. Louisiana Light & H. Producing & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560.
The validity of local statutes enacted to the end of providing for the public safety of all within the jurisdiction of a state is not to be questioned in a Federal court under the Constitution of the United States, unless they are clearly inconsistent with some power granted to the general government or with some right secured by that instrument or unless they are purely arbitrary in their nature. Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 S. Ct. 275.
See infra, §§ 259, 261 et seq.

been asserted to be competent for the legislature in creating municipal corporations to deprive them of all common-law police power and to enact that they shall possess and exercise such power only as is conferred by statute.[8]

In those states where municipalities are specifically granted the right of local self-government by home-rule provisions of the state Constitution,[9] they are also often given the right to adopt and enforce within their limits such local police regulations as are not in conflict with general laws.[10]

The exercise of the police power directly by the legislature and by municipalities under legislative authority stands on the same ground and is subject to the same conditions,[11] and a city has no more power than the state to divest itself of the right to exercise the police power.[12]

§ 257. Federal Government.—Congress has no general power to enact police regulations operative within the territorial limits of a state,[13] and it cannot take this power from the states or attempt any supervision over the regulations of the states established under this power.[14] The exercise of the police power by a state is beyond interference by the Federal Government, except by virtue of some authority derived from the Constitution of the United States.[15] All that the Federal Government can do ordinarily is to see that the states do not, in attempting to exercise the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has vested in the National Government, or deprive a citizen of rights guaranteed to him by the Federal Constitution.[16]

The statement that the Federal Government exercises no police powers, al-

though technically correct, is erroneous to the extent that such an assumption involves the conception of a total absence of powers in the nature of police powers in the Federal Government, because it runs counter to the repeated exercise by the National Government of legislative powers within the sphere of general powers granted to it by the Constitution which are typical of what would, in the case of a state, be designated as "police powers." Once it is assumed that the general subject of a controversy is properly within the scope of the enumerated powers granted to the Federal Government, that government has as broad powers to prescribe police regulations concerning such subjects as a state government would have concerning a subject within its reserved powers. Such powers are analogous to the police power of the states. In other words, the limitation in the Constitution (in the Tenth Amendment) of the powers of the Federal Government deprives that government of the right to exercise police powers only to the extent that the exercise of such powers may not be connected or associated with one of the powers expressly or by necessary implication granted to that government. It has been stated that the accurate way of putting it is not that the United States has no police power, but that the United States possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted it by the Constitution. Thus, under the power of Congress to regulate interstate and foreign commerce, and under other powers such as the war power, the power over mails, and power over Federal lands regulatory Federal measures have been adopted and held valid which are directly analogous to the police power exercised by state legislatures.[17]

5. Effect of Local and Geographical Factors in Determination

§ 258. Generally.—The principle has been recognized by the Supreme Court that the exercise of the police power may and should have reference to the peculiar situation and needs of the community.[18] The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil.[19] Thus, a state may accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development, or it may enact laws suited to the conditions existing in a mining region.[20] Consequently, it is established that the validity of police regulations may depend in part on geographic and local considerations. A police regulation relating to tenements, lodging

[17] Annotation: 81 L. ed. 938 et seq.

Although the United States lacks the police power, this being reserved to the states, it is none the less true that when the United States exerts any of the powers conferred on it by the Federal Constitution, no valid objection can be based on the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 S. Ct. 106; Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260, 40 S. Ct. 141.

When the United States exerts any of the powers conferred on it by the Constitution, no valid objection can be based on the fact that such exercise may be attended by some or all the incidents which attend the exercise by a state of its police power. Lambert v. Yellowley, 272 U. S. 581, 71 L. ed. 422, 47 S. Ct. 210, 49 A.L.R. 575.

Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good, the possession and enjoyment of liberty and property being subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

Congress has plenary power over the District of Columbia and passes police regulations for it. See States, Territories, and Dependencies [Also Territories, 26 R. C. L. p. 677, § 17].

[18] New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 S. Ct. 1.

[19] Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289.

[20] Bown v. Walling, 204 U. S. 320, 51 L. ed. 503, 27 S. Ct. 292; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289.

houses, and boardinghouses may be reasonable in reference to conditions which exist in a large city, but might be unreasonable if applied to the state at large.[1]

It is no valid objection to a police regulation that it is made applicable alone to a segregated area or district.[2] Furthermore, certain businesses may be restricted to certain localities in the proper exercise of the police power.[3] For example, a municipality may in some jurisdictions regulate the location of livery stables and confine them to certain regions within the corporate limits,[4] and an ordinance limiting to designated territory the right to erect and maintain gasworks may be a legitimate exercise of the police power.[5] On the other hand, such police regulations may be unreasonable, as was decided in reference to a statute forbidding any person to carry on the stabling business within a given distance of the grounds of a specified agricultural society during the continuance of its fairs.[6] Similarly, it has been held that constitutional authority to make and enforce police regulations does not justify a municipality in prohibiting the maintenance of a public laundry in any except two designated blocks of the town without a license to be granted only on obtaining the written consent of the owners of a majority of the real estate in the block where the business is to be conducted and in the four surrounding blocks.[7]

Appellate courts when called upon to determine the validity of police regulations frequently incline towards acquiescing in the opinion of local tribunals and bodies,[8] because the latter are familiar with local conditions and are in a better position to judge of the necessity of such enactments.[9] Considerable latitude is sometimes allowed for possible peculiar conditions as to which the appellate court may have only little knowledge.[10]

B. Relationship between Constitutional Rights and Police Power

§ 259. Generally.—A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not rendered invalid by the fact that it may affect incidentally the exercise of some right guaranteed by the Constitution.[11] For example, it is said that the proper exer-

[1] Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

[2] Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

[3] See infra, § 287.

[4] St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L.R.A. 721.

[5] Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18.

[6] Com. v. Bacon, 13 Bush (Ky.) 210, 26 Am. Rep. 189.

[7] Ex parte Sing Lee, 96 Cal. 354, 31 P. 245, 24 L.R.A. 195, 31 Am. St. Rep. 218.

[8] Adams v. Milwaukee, 228 U. S. 572, 57 L. ed. 971, 33 S. Ct. 610, affirming 144 Wis. 371, 129 N. W. 518, 43 L.R.A.(N.S.) 1066; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.

[9] Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Green River v. Fuller Brush Co. (C. C. A. 10th) 65 F. (2d) 112, 88 A.L.R. 177; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Allion v. Toledo, 99 Ohio St. 416, 124 N. E. 237, 6 A.L.R. 426; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.

[10] Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A. 1918A, 136, Ann. Cas. 1917C, 594; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.

[11] Borden v. Louisiana State Bd. of Edu. 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087; Moss v. Mississippi Live Stock Sanitary Bd. 154 Miss. 765, 122 So. 776, citing R. C. L.; State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A.(N.S.) 179; Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; People v. King, 110 N. Y. 418,

cise of the police power is not subject to restraint by constitutional provisions designed for the general protection of rights of individual life, liberty, and property.[12] Nevertheless, the police power is not without its limitations, since it may not unreasonably invade private rights[13] and thus violate those rights which are guaranteed under either Federal or state Constitutions.[14] The

18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; Colletti v. State, 12 Ohio App. 104, 31 Ohio C. A. 81 (motion for leave to file petition in error overruled in 17 Ohio L. Rep. 364, 64 W. L. Bull. 462) citing R. C. L.; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Opinion to Governor, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

The right of the legislature to make such reasonable and wholesome laws as it thinks will promote the public welfare includes the power to impose such reasonable and wholesome restrictions on the rights secured to individuals by the Bill of Rights as it thinks will be for the best interest of the community, notwithstanding such restrictions were unknown to the common law. Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179.

As to the principles that rights are subject to the police power, see infra, § 267.

12 See infra, § 262.

13 Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Miller v. Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Maxwell v. Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682; Atlantic Coast Line R. Co. v. Gainsville, 83 Fla. 275, 91 So. 118, 29 A.L.R. 668; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Chicago v. Kautz, 313 Ill. 196, 144 N. E. 805, 35 A.L.R. 1050; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Cortland v. Larson, 273 Ill. 602, 113 N. E. 51, L.R.A.1917A, 314, Ann. Cas. 1916E, 775; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A.(N.S.) 998; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A. (N.S.) 546, Ann. Cas. 1914D, 1261; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; State v. Miksicek, 225 Mo. 561, 125 S. W. 507, 135 Am. St. Rep. 597; Re Arrigo, 98 Neb. 134, 152 N. W. 319, L.R.A. 1917A, 1116; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472; State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; State v. Walker, 48 Wash. 8, 9 P. 775, 15 Ann. Cas. 257; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 851; Milkint v. McNeeley, 113 W. Va. 804, 169 S. E. 790, citing R. C. L.; State ex rel. La Follette v. Kohler, 209 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

"While it is difficult, if not impossible, to define precisely the limits of the police power, there must in the very nature of things be some limit to it; for otherwise the guaranties of written Constitutions would be little more than mere precatory and directory suggestions without force or life, affording to the citizen only a false and illusory protection against the invasion of his rights by the state, and his security would depend not upon constitutional guaranties, but upon the will of the state in exercising an unlimited police power." Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455.

The fact that legislation may be of some public benefit is not enough to give it validity; in addition, it must not impair or destroy private rights guaranteed by the Constitution. Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

The Constitution forbids the exercise of the police power when it would result in the destruction of rights, guaranties, privileges, and restraints excepted from the powers of government by the Bill of Rights. Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802.

The constitutional provision granting legislative power and that reserving individual rights are to be considered together as interdependent, the one qualifying and limiting the other; and neither is supreme in a sense that would deprive the other of its effectiveness. Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

14 **United States.**—Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 S. Ct. 663; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 S. Ct. 485, 14 Ann. Cas. 1101; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Mugler v. Kansas, 123 U. S. 623, 31

police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set side, regardless of their clear and plain meaning, nor is it a substitute for those guaranties.[15]

With regard particularly to the Federal Constitution, it is elementary that a right secured or protected by that document cannot be overthrown or impaired by any state police authority,[16] because the police power of a state

L. ed. 205, 8 S. Ct. 273; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

California.—Wood v. Hamaguche, 207 Cal. 79, 277 P. 113, 63 A.L.R. 861.

Connecticut.—State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131.

Georgia.—Carey v. Atlanta, 143 Ga. 192, 84 S. E. 456, L.R.A.1915D, 684, Ann. Cas. 1916E, 1151.

Illinois.—Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315.

Indiana.—Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313.

Iowa.—Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347.

Louisiana.—State v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92.

Maine.—State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810.

Maryland.—Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819.

Michigan. — Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699.

Minnesota.—Evans v. Chicago & N. W. R. Co. 109 Minn. 64, 122 N. W. 876, 26 L.R.A.(N.S.) 278.

Mississippi.—State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495.

Missouri.—Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L.R.A.1917B, 551; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487.

Nebraska.—State v. Sperry & H. Co. 94 Neb. 785, 144 N. W. 795, 49 L.R.A.(N.S.) 1123.

New Mexico.—State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

New York.—Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

North Carolina.—Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237; State ex rel. Smith v. Baltimore Fidelity & D. Co. 191 N. C. 643, 132 S. E. 792 (writ of error dismissed in 275 U. S. 505, 72 L. ed. 396, 48 S. Ct. 156) citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696.

North Dakota.—State er rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

Ohio.—State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52.

Oklahoma.—State ex rel. Roth v. Waterfield, 167 Okla. 209, 29 P. (2d) 24, citing R. C. L.

Oregon.—Hyde v. Albert E. Pierce & Co. 147 Or. 5, 31 P. (2d) 755, citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512.

Rhode Island.—State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818.

South Carolina.—Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.

South Dakota.—State v. Scougal, 3 S. D. 55, 51 N. W. 853, 15 L.R.A. 477, 44 Am. St. Rep. 756.

Tennessee.—Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

Texas.—Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1007, 96 A.L.R. 802; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387; Stockwell v. State, 110 Tex. 550, 221 S. W. 932, 12 A.L.R. 1116; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.

Utah.—Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Logan City v. Public Utilities Commission, 72 Utah, 536, 271 P. 961, citing R. C. L.; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

Vermont.—Re Guerra, 94 Vt. 1, 110 A. 224, 10 A.L.R. 1560; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695.

Washington.—State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; State v. Smith, 42 Wash. 237, 85 P. 29, 114 Am. St. Rep. 114.

West Virginia.—Milkint v. McNeeley, 113 W. Va. 804, 169 S. E. 790, citing R. C. L.; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

Wisconsin.—State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

15 Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455.

16 Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Lafarier v. Grand Trunk R. Co. 84 Me. 286, 24 A. 848, 17 L.R.A. 111; O'Neil v. Providence

must be exercised in subordination to the provisions of the Federal Constitution.[17]

It is settled that the constitutional rights protected from invasion by the police power include rights safeguarded by both the express and the implied prohibitions in the constitutions.[18] As a rule, fundamental limitations of regulations under the police power are found in the spirit of the Constitution, not in its letter, although they are just as efficient as if expressed in the clearest language.[19] In accordance, however, with the general rule that legislation is never invalidated by the courts merely because it may conflict with notions of social justice,[20] police regulations may not be declared void merely because they are deemed to be contrary to natural justice and equity, but only because they violate some constitutional right.[1]

§ 260. Applications of Rule.—Under the general principle that the exercise of the police power is limited in that it may not unreasonably limit rights guaranteed by the Federal and state Constitutions,[2] it is established that the constitutional guaranty of the right of property protects it not only from confiscation by legislative edicts,[3] but also from any unjustifiable impairment or abridgment.[4]

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated by attempted police regulation without the physical taking of property for public or private use. Its capability for enjoyment and its adaptability to some use are essential characteristics and attributes without which the idea of property cannot be conceived.[5]

Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590.

A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. ed. 1090, 55 S. Ct. 563, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652.

17 Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. ed. 1090, 55 S. Ct. 563, rehearing denied in 295 U. S. 768, 79 L. ed. 1709, 55 S. Ct. 652; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 S. Ct. 565; Iowa Motor Vehicle Asso. v. Railroad Comrs. 207 Iowa, 461, 221 N. W. 364, 75 A.L.R. 1, affirmed in 280 U. S. 529, 74 L. ed. 595, 50 S. Ct. 151.

"The police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution." Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201.

As to the effect of Fourteenth Amendment to the Federal Constitution on the exercise of the police power, see infra, § 261.

18 Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L.R.A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

For application of this principle generally to state legislation, see supra, § 194.

19 Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

20 See supra, § 135.

1 Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899.

The Supreme Court of Illinois has held that the police power should not "override the demands of natural justice." In so doing the court cites as authority the United States Supreme Court case of Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175, but the statement so quoted is from the dissenting opinion in the Chicago, B. & Q. R. Co. Case, supra; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610.

2 See supra, § 259.

3 Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657.

4 People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657.

Annotation: 18 L.R.A. 543.

5 Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 P. 62, L.R.A. 1918C, 849; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185.

Hence, a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes,[6] destroys its value,[7] restricts or interrupts its common, necessary, or profitable use,[8] hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value.[9]

These general principles apply not only to statutes enacted by the legislature, but to the action of executive officers generally.[10]

C. Constitutional Limitations

§ 261. Effect of Fourteenth Amendment.—In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation,[11] it is particularly established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with,[12] and does not interfere with,[13] curtail,[14] restrain,[15] destroy,[16]

1 Ann. Cas. 936; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689, citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L.R.A. 808, 20 Am. St. Rep. 123.

As to the nature of the right to property guaranteed by the Constitution, see infra, § 335.

6 Indian Ref. Co. v. Ambraw River Drainage Dist. (D. C.) 1 F. Supp. 937, citing R. C. L.; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689, citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.

As to what constitutes a "taking" under the due process clause, see Vol. 12, Subd. XIV.

7 Indian Ref. Co. v. Ambraw River Drainage Dist. (D. C.) 1 F. Supp. 937, citing R. C. L.; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689, citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.

8 Indian Ref. Co. v. Ambraw River Drainage Dist. (D. C.) 1 F. Supp. 937, citing R. C. L.; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; Young v. Mall Invest. Co. 172 Minn. 428, 215 N. W. 840, 55 A.L.R. 461; Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689, citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L.R.A. 808, 20 Am. St. Rep. 123.

As to lack of power under guise of police power to prohibit use of property, see infra, § 303.

9 Indian Ref. Co. v. Ambraw River Drainage Dist. (D. C.) 1 F. Supp. 937, citing R. C. L.; Chicago v. Wells, 236 Ill. 129, 86 N. E. 197, 23 L.R.A.(N.S.) 405, 127 Am. St. Rep. 282; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 976, 42 L.R.A. 686, 68 Am. St. Rep. 575; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; Henderson v. Greenwood, 172 S. C. 16, 172 S. E. 689, citing R. C. L.; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.

Annotation: 23 L.R.A.(N.S.) 405.

10 Indian Ref. Co. v. Ambraw River Drainage Dist. (D. C.) 1 F. Supp. 937, citing R. C. L.; Anable v. Montgomery County, 34 Ind. App. 72, 71 N. E. 272, 107 Am. St. Rep. 173; Gaertner v. Stolle (Tex. Civ. App.) 238 S. W. 252, citing R. C. L.; Block v. Schwartz, 27 Utah, 287, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Inman v. Sandvig, 170 Wash. 112, 15 P. (2d) 696, citing R. C. L.

11 See supra, § 255.

12 Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 30 S. Ct. 676, 47 L.R.A.(N.S.) 84; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 S. Ct. 470, 16 Ann. Cas. 1066; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Walker v. Pennsylvania, 127 U. S. 699, 32 L. ed. 261, 8 S. Ct. 997; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Barbier v.

Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357 (leading case); Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A.1916C, 278; Re Ramerez, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Cassidy v. Wiley, 141 Ga. 331, 80 S. E. 1046, 51 L.R.A.(N.S.) 128; Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; New Orleans v. Calamari, 150 La. 737, 91 So. 172, 22 A.L.R. 106; State v. Legendre, 138 La. 154, 70 So. 70, L.R.A.1916B, 1270; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; State v. Latham, 115 Me. 176, 98 A. 578, L.R.A. 1917A, 480; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; State v. Danenburg, 151 N. C. 718, 66 S. E. 301, 26 L.R.A.(N.S.) 890; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 127 N. W. 650, 35 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 700; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114.

Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of its police power to protect the safety, the health, the morals, and general welfare of the public and with such conditions the Fourteenth Amendment is not designed to interfere. Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133.

The Fourteenth Amendment was not intended to curtail the powers of the states to amend their laws in such a way as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life. Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287.

[13] **United States.**—Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Lacoste v. Department of Conservation, 263 U. S. 545, 68 L. ed. 437, 44 S. Ct. 186; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 1112, L.R.A.1918C, 765, Ann. Cas. 1918E, 660; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522, affirming 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 924, 30 S. Ct. 676, 47 L.R.A. (N.S.) 84; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; Atchison, T. & S. Fe R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 S. Ct. 609; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 S. Ct. 191; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Walker v. Pennsylvania, 127 U. S. 699, 32 L. ed. 261, 8 S. Ct. 997; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

Colorado.—Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269.

Dakota.—Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

Illinois.—Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.

Indiana.—Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A. (N.S.) 973, Ann. Cas. 1913C, 724.

Iowa.—Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

Kansas.—Glenn v. Callahan, 125 Kan. 44, 262 P. 583, citing R. C. L.; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Meffert v. State Bd. of Medical Registration, 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.

Louisiana.—New Orleans v. Postek, 180 La. 1048, 158 So. 553, citing R. C. L.; State v. Bonoa, 172 La. 955, 136 So. 15, citing R. C. L.; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; New Orleans v. Schick, 167 La. 674, 120 So. 47, citing R. C. L.; New Orleans v. Calamari, 150 La. 737, 91 So. 172, 22 A.L.R. 106; State v. McCormick, 142 La. 586, 77 So. 288, L.R.A.1918C, 262; Shreveport v. Schulsinger, 113 La. 9, 36 So. 870, 2 Ann. Cas. 69.

Maine.—State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; Opinions of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275.

Maryland.—State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957, Scholle v. State, 90 Md. 729, 46 A. 326, 50 L.R.A. 411.

Massachusetts.—Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604.

Michigan.—Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

Minnesota.—State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607.

Montana.—Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

New York.—People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133.

North Carolina.—Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A. (N.S.) 321; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696.

North Dakota.—Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338.

Oklahoma.—Barbour v. Walker, 126 Okla. 227, 259 P. 552, 56 A.L.R. 1049; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.

Oregon.—Camas Stage Co. v. Kozer, 104 Or. 600, 209 P. 95, 25 A.L.R. 27; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, affirmed in 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957.

Pennsylvania.—Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603; Com. v. Moore, 5 Pa. D. & C. 738, citing R. C. L.

South Carolina.—Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607.

Utah.—Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; State v. Sopher, 25 Utah, 318, 71 P. 482, 60 L.R.A. 468, 95 Am. St. Rep. 845.

Virginia.—Com. v. Henry, 110 Va. 879, 65 S. E. 570, 26 L.R.A.(N.S.) 883; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893.

Washington.—State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625.

West Virginia.—Ex parte Dickey (Dickey v. Davis) 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840; Fellows v. Charleston, 62 W. Va. 665, 59 S. E. 623, 13 L.R.A.(N.S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185; State v. Myers, 42 W. Va. 822, 26 S. E. 539, 35 L.R.A. 844, 57 Am. St. Rep. 887, overruled on another point in State v. Bruce, 55 W. Va. 384.

Wisconsin.—State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269; Julien v. Model Bldg. Loan & Invest. Asso. 116 Wis. 79, 92 N. W. 561, 61 L.R.A. 668; State v. Currans, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

Wyoming.—State v. Hall, 27 Wyo. 224, 194 P. 476, citing R. C. L.

[14] Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 S. Ct. 865.

[15] Pacific Gas & E. Co. v. Police Ct. 251 U. S. 22, 64 L. ed. 112, 40 S. Ct. 79; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

[16] Cunnius v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 S. Ct. 721, 3 Ann. Cas. 1121; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731.

[17] Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 335.

[18] Cunnins v. Reading School Dist. 198 U. S. 458, 49 L. ed. 1125, 25 S. Ct. 721, affirming 206 Pa. 469, 55 A. 16, 98 Am. St. Rep. 790, 3 Ann. Cas. 1121; Brim v. Jones, 165 U. S. 180, 41 L. ed. 677, 17 S. Ct. 282; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N. E. 815, 22 A.L.R. 835; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A. (N.S.) 1080, Ann. Cas. 1913A, 406; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275.

[19] Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 31 S. Ct. 186, 32 L.R.A. (N.S.) 1062, Ann. Cas. 1912A, 487; Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359; Hunter v. Colfax Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917B, 803; United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88; State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So.

or take from the states[17] the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a state may be exerted.[18]

In discussing the relationship between the guaranties of the Fourteenth Amendment and the police power of the states, Justice Holmes has pointed out: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power."[19]

Although the Fourteenth Amendment does not interfere with a proper exercise of the police power,[20] in accordance with the general principle that the power must be so exercised as not to invade unreasonably the rights guaranteed by the Federal Constitution,[1] it is established beyond question that every state power, including the police power, is limited by the inhibition of the Fourteenth Amendment.[2] Moreover, the ultimate test of the propriety of police regulations must be found in the Fourteenth Amendment, since it operates to limit the field of police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects.[3]

§ 262. —Effect of Due Process Clause.—The general rule is firmly settled that the provisions of the Fourteenth Amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law do not operate as a limitation upon the police power of the state to pass and enforce such laws as will inure to the health, morals, and general welfare of the people.[4] A statute or municipal ordinance which is a valid exercise of the police power does not violate the due process clauses of the state and Federal Constitutions.[5] Moreover, these provisions of the amendment and similar

1215, 45 L.R.A.(N.S.) 851; Hill v. Rea, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; Salt Lake City v. Industrial Commission, 58 Utah, 314, 199 P. 152, 18 A.L.R. 259.

[20] See cases cited supra, notes 12–17, this section.

[1] See supra, § 259.

[2] Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148.

[3] Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190.

The provision of the Fourteenth Amendment that no state shall deprive a person of his life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws does not prohibit any legislation to promote health, good order, and peace, but only inhibits discriminating and partial enactments favoring some to the impairment of rights of others, the principal, if not the sole, object of its prohibitions being to prevent any arbitrary invasion by state authority of the rights of persons or property and to secure to everyone the right to pursue his happiness unrestrained except by just, equal, and impartial laws. Per Field, J., in Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652.

[4] Pacific Gas & E. Co. v. Police Ct. 251 U. S. 22, 64 L. ed. 112, 40 S. Ct. 79; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642, affirming 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A. 1916C, 278; State Sav. & C. Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790; New Orleans v. Postek, 180 La. 1048, 158 So. 553, citing R. C. L.; Lacoste v. Department of Conservation, 151 La. 909, 92 So. 381 (affirmed in 263 U. S. 545, 68 L. ed. 437, 44 S. Ct. 186) citing R. C. L.; State v. McCormick, 142 La. 580, 70 So. 288, L.R.A.1918C, 262; State v. Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L.R.A. 135; Chesapeake & P. Teleph. Co. v. Goldsborough, 125 Md. 666, 94 A. 322, Ann. Cas. 1917A, 1; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, writ of error dismissed in 207 U. S. 599, 52 L. ed. 358, 28 S. Ct. 253; Moss v. Mississippi Live Stock Sanitary Bd. 154 Miss. 765, 122 So. 776, citing R. C. L.; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A. 1917C, 528; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Com. v. Moore, 5 Pa. D. & C. 738, citing R. C. L.; Shealy v. Southern R. Co. 127 S. C. 15, 120 S. E. 561, citing R. C. L.; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L.R.A. 131; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann Cas. 1915C, 1102.

[5] Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; State v. Holden (Holden v. Hardy) 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

clauses in the state Constitutions do not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public.[6]

The Supreme Court has pointed out that the Fourteenth Amendment requires that governmental regulation shall be accomplished by methods consistent with due process[7] and that the due process clause is a limitation upon an improper exercise of the police power by the states[8] in that it prevents an arbitrary or unreasonable exercise of the power[9] through laws or regulations.[10]

§ 263. —Effect of Equal Protection Clause.—The clause of the Fourteenth Amendment forbidding any state to deny to any person within its jurisdiction the equal protection of the laws does not limit and was not designed to limit the police power of the state,[11] nor does it affect a proper exercise of such power.[12]

In the consideration of the relationship between the equal protection clause and the police power of the states, the principle must be kept in mind that as in the regulation of all rights secured from infringement by Federal constitutional guaranties,[13] it is settled that the police power is subordinate to the constitutional guaranty of equality of privilege and of burden contained in this clause.[14] Therefore, any attempted exercise of police power which results in a denial of the equal protection of the laws is invalid.[15]

[6] Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872, 64 L.R.A. 679, 99 Am. St. Rep. 614, affirmed in 194 U. S. 361, 48 L. ed. 1018, 24 S. Ct. 673; Com. v. Moore, 5 Pa. D. & C. 738, citing R. C. L.

See infra, §§ 284, 287.

[7] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[8] Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535.

[9] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 54 So. 598, 32 L.R.A.(N.S.) 522.

An unreasonable or unnecessary exertion of municipal authority or of the police power in the manner or extent to which private personal or property rights are curtailed or impaired violates organic law in that it deprives persons of liberty and property without authority or due process of law. Maxwell v. Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682.

As to what is reasonable and what is not reasonable in the exercise of police measures, see infra, §§ 302 et seq.

[10] Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[11] Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707, writ of error dismissed in 170 U. S. 408, 42 L. ed. 1087, 18 S. Ct. 631; State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500.

The equal protection clause of the Federal Constitution does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids only what is done without any reasonable basis and therefore is purely arbitrary. Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

See also State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

For discussion of classification under police laws, see Vol. 12, Subd. XIII.

[12] Schoolcraft v. Louisville & N. R. Co. (Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.) 92 Ky. 233, 17 S. W. 567, 14 L.R.A. 579.

[13] See supra, § 259.

[14] Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1105, 62 L.R.A. 136; State v. Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L.R.A. 231; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Jackman, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438.

[15] Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Atchison, T. &

Under the limitations of the equal protection clause, in order to justify the interposition of the authority of the state in enacting police regulations, it must appear that the interests of the public generally as distinguished from those of a particular class require such interference,[16] for it is a rule that police power cannot be invoked to protect one class of citizens against another class unless such interference is for the real protection of society in general.[17] Where it is actually for the benefit of society, however, the state may enact such laws for the safety and protection of its citizens as the circumstances and necessities of a particular class may require without violating any constitutional guaranty.[18] In some unusual cases where the circumstances call for protection, it is within the police power to protect any class of citizens which stands in need of such protection.[19]

§ 264. Effect of Clause as to Obligation of Contracts.—The constitutional prohibition against state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety. One or more of these factors may be involved in the execution of such contracts. Rights and privileges arising from contracts are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as is all property, whether owned by natural persons or corporations.[20] Not all

S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, 35 S. Ct. 675, L.R.A.1915E, 953; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; State v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92; State v. Montgomery, 94 Me. 192, 47 A. 165, 80 Am. St. Rep. 386; Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421; State ex rel. Woolridge v. Morehead, 100 Neb. 864, 161 N. W. 569, L.R.A.1917D, 310; State v. Jackson, 69 N. H. 318, 41 A. 347, 42 L.R.A. 438; People ex rel. Duryea v. Wilber, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A. (N.S.) 357, 19 Ann. Cas. 626; State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L.R.A. 423, 28 Am. St. Rep. 715; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

Annotation: 14 L.R.A. 584.

[16] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; State v. Tenant, 110 N. C. 609, 14 S. E. 387, 15 L.R.A. 423, 28 Am. St. Rep. 715; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; State v. Brown, 37 Wash. 97, 79 P. 635, 107 Am. St. Rep. 798, 68 L.R.A. 889; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L.R.A. 589, 98 Am. St. Rep. 933; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

Regulations and restrictions imposed under the police power must find justification in the general public welfare rather than in the protection of private interests. State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

A statute providing for the creation and maintenance of a fund of a certain amount, out of interest received on deposits of various public funds, for the purpose of guaranteeing the repayment of all public funds deposited under a public depository act, is not invalid as an exertion of the police power on behalf of individuals or classes rather than of the general public. Storen v. Sexton, — Ind. —, 200 N. E. 251, 104 A.L.R. 1359.

[17] Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Capital Gas & E. Co. v. Boynton, 137 Kan. 717, 22 P. (2d) 958, citing R. C. L.; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736; John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

[18] Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

[19] Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, 42 L.R.A.(N.S.) 1060, Ann. Cas. 1914D, 613 (ordinance requiring stools for street car motormen sustained).

[20] Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Thornton v. Duffy, 254 U. S. 361, 65 L. ed. 304, 41 S. Ct. 137; Hardin-Wyandot Light-

police legislation which has the effect of impairing a contract is obnoxious to the constitutional prohibition as to impairment.[1] It must be remembered, however, that although the obligations of contracts must yield to a proper exercise of the police power, the latter must be exercised for an end which is

ing Co. v. Upper Sandusky, 251 U. S. 173, 64 L. ed. 210, 40 S. Ct. 104; Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 269, 63 L. ed. 599, 39 S. Ct. 274; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 S. Ct. 419; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; New York ex rel. New York Electric Lines Co. v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 S. Ct. 880; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 S. Ct. 273; New Orleans Gaslight Co. v. Louisiana Light & Heat Producing Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A.(N.S.) 260, 14 Ann. Cas. 1080, affirmed in 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 142 Ga. 841, 83 S. E. 946, L.R.A.1916E, 358; Washington v. Atlantic Coast Line R. Co. 136 Ga. 638, 71 S. E. 1066, 38 L.R.A.(N.S.) 867; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. W. 416, 6 A.L.R. 1584; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Grand Trunk W. R. Co. v. South Bend, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L.R.A.(N.S.) 850; Welsbach Street Lighting Co. v. Public Utilities Commission, 101 Kan. 774, 169 P. 205, L.R.A.1918D, 310; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507, affirmed in 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549; State v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L.R.A. 759; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696; State v. Missouri K. & T. R. Co. 99 Tex. 516, 91 S. W. 214, 5 L.R.A.(N.S.) 783, 13 Ann. Cas. 1072; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Lloyds of Texas v. Bobbitt (Tex. Civ. App.) 40 S. W. (2d) 897 (writ of error dismissed in (Tex. Com. App.) 55 S. W. (2d) 803) citing R. C. L.; Raymond Lumber Co. v. Raymond Light & Water Co. 92 Wash. 330, 159 P. 133, L.R.A. 1917C, 574; Seattle v. Hurst, 50 Wash. 424, 97 P. 454, 18 L.R.A.(N.S.) 169.

Annotation: 9 A.L.R. 1427.

In every case involving an inquiry as to whether a law is valid as an exercise of the police power or void as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it: the difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 33 S. Ct. 303, 44 L.R.A.(N.S.) 405.

A state can by no act deprive itself of the right or authority to enact legislation within the proper scope of the police power, even though the effect of a particular enactment is to impair the obligation of private contracts and prevent the enforcement of the terms thereof. Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249.

The enactment of reasonable laws for the protection of the public cannot be headed off by making contracts extending into the future. Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362.

As to the effect of the police power on the obligation of contracts, see Vol. 12, Subd. XI.

[1] Treigle v. Acme Homestead Asso. 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587, 588; Semler v. Oregon State Dental Examiners, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570; Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481; Mississippi Society of Arts & Sciences v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L. See also W. B. Worthen Co. v. Thomas, 292 U. S. 426, 78 L. ed. 1344, 54 S. Ct. 816, 93 A.L.R. 173.

in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.[2]

The authority of the legislature, in the exercise of its police powers, cannot be limited or restricted by the provisions of contracts between individuals and corporations,[3] between the state and private interests,[4] or between individuals and municipal corporations.[5]

Specific examples of the foregoing principles arise where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.[6] The operation of the rule, however, is restricted to those situations in which the contract involves matters within the scope and objects of the police power. For example, where a contract entered into by a city for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.[7]

§ 265. Limitations under Commerce Clause.—It is well established that a state may exercise its power to make regulations for the protection of the health, the lives, and the property of the people of the state against the dangers arising in interstate transportation and commerce, concurrent with the laws passed by Congress in the exercise of the jurisdiction of Congress over the same subjects, and that the laws of the state are valid and may be enforced so long as they do not conflict with the provisions of Federal legislation[8] or the Federal Constitution.[9] The right of a state, in the exercise of

[2] Treigle v. Acme Homestead Asso. 297 U. S. 189, 80 L. ed. 575, 56 S. Ct. 408, 101 A.L.R. 1284, rehearing denied in 297 U. S. 728, 80 L. ed. 1010, 56 S. Ct. 587, 588.

[3] Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 65 L. ed. 877, 41 S. Ct. 465; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Buffalo East Side Street R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 19 N. E. 63, 2 L.R.A. 384; Com. v. Moore, 5 Pa. D. & C. 738, citing R. C. L.; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081.

[4] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 S. Ct. 870.

[5] Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Lingo Lumber Co. v. Hayes (Tex. Civ. App.) 64 S. W. (2d) 835, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[6] Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249; Kuenali v. Stone, 112 Misc. 125, 182 N. Y. S. 680, citing R. C. L.; Com. v. Moore, 5 Pa. D. & C. 738, citing R. C. L.; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

Annotation: 28 L. ed. 923.

[7] Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 S. Ct. 77.

A contract concerning proprietary rights, harmless in itself, which is made by a municipality in the exercise of power clearly conferred is protected by the Constitution and the police power cannot be invoked to abrogate or impair it. Interurban R. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A.L.R. 696.

[8] Townsend v. Yeomans, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 S. Ct. 1; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 S. Ct. 313; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 S. Ct. 732; Escanaba & L. M. Transp.

the police power, to make regulations which indirectly affect interstate commerce has been frequently sustained.[10] Hence, if a statute can fairly be called an exercise of the police power upon a subject in regard to which the states have a right to legislate, the fact that it puts a limitation on what would otherwise be interstate commerce will not necessarily render it invalid.[11] A state cannot, however, under cover of exercising its police power, undertake what amounts essentially to a regulation of interstate commerce or impose a direct burden upon that commerce;[12] to the extent that an act of a state legislature in the exercise of its police power amounts to a regulation of, or discrimination against, interstate commerce, it will not be upheld.[13]

§ 266. Compensation for Injuries Occasioned by Exercise of Police Power.—The fact that police laws and regulations prevent the enjoyment of certain individual rights in property without providing compensation therefor does not necessarily render them unconstitutional as violating the due process clause or as appropriating private property for public use without com-

Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648; Wilson v. Black Bird Creek Marsh Co. 2 Pet. (U. S.) 245, 7 L. ed. 412; State ex rel. Burr v. Seaboard Air Line R. Co. 89 Fla. 419, 104 So. 602, 39 A.L.R. 1362; Luken v. Lake Shore & M. S. R. Co. 248 Ill. 377, 94 N. E. 175, 140 Am. St. Rep. 220, 21 Ann. Cas. 82; Harrigan v. Connecticut River Lumber Co. 129 Mass. 580, 37 Am. Rep. 387; Burrows v. Delta Transp. Co. 106 Mich. 582, 64 N. W. 501, 29 L.R.A. 468.

See generally CARRIERS, Vol. 9, p. 453, § 44; COMMERCE, supra, p. 85, § 94.

[9] Sands v. Manistee River Improv. Co. 123 U. S. 288, 31 L. ed. 149, 8 S. Ct. 113; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 S. Ct. 254; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779.

[10] Great Northern R. Co. v. Washington, 300 U. S. 154, 81 L. ed. 573, 57 S. Ct. 397, rehearing denied in 300 U. S. 686, 81 L. ed. 888, 57 S. Ct. 504; Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 S. Ct. 10; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 S. Ct. 485, 14 Ann. Cas. 1101; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 S. Ct. 784; Smith v. St. Louis & S. W. R. Co. 181 U. S. 248, 45 L. ed. 847, 21 S. Ct. 603; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 S. Ct. 600; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; per Taney, Ch. J., License Cases, 5 How. (U. S.) 504, 12 L. ed. 256; Detweiler v. Welch (C. C. A. 9th) 46 F. (2d) 75, 73 A.L.R. 1440; State ex rel. Collins v. Senatobia Blank Book & Stationery Co. 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953; E. Fougera & Co. v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917F, 158; Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675. See Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546.

The police powers of the state have full recognition by the Federal Government, and unless the laws passed in pursuance of such powers unduly interfere with the commerce clause of the Federal Constitution they have been upheld by the United States Supreme Court. State ex rel. Barker v. Merchants' Exch. 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871, affirmed in 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114.

[11] Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 S. Ct. 784; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 S. Ct. 465; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842.

[12] Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45; Michigan Pub. Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 S. Ct. 265; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; State v. Duckworth, 5 Idaho, 642, 51 P. 456, 39 L.R.A. 365, 95 Am. St. Rep. 199; Western U. Teleg. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692, reversed on other grounds in 122 U. S. 347, 30 L. ed. 1187, 7 S. Ct. 1126; Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; State v. Jacobson, 80 Or. 648, 157 P. 1108, L.R.A.1916E, 1180; Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081.

[13] Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829; State v. Lowry, 166 Ind. 372, 77 N. E. 728, 4 L.R.A.(N.S.) 528, 9 Ann. Cas. 350.

pensation.[14] Such laws, when reasonable and adapted to the scope and objects covered by the police power, are not considered as appropriating private property for public use, but simply as regulating its use and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.[15]

[14] New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; Calhoun v. Massie, 253 U. S. 170, 64 L. ed. 843, 40 S. Ct. 474; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 S. Ct. 341; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 84 N. E. 1049, 17 L.R.A.(N.S.) 1071; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Louisiana State Bd. of Agri. & Immigration v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A.1917C, 894, Ann. Cas. 1917E, 217; New Orleans v. Charouleau, 121 La. 890, 46 So. 911, 18 L.R.A. (N.S.) 368, 126 Am. St. Rep. 332, 15 Ann. Cas. 46; Com. v. Boston Adv. Co. 188 Mass. 348, 74 N. E. 601, 69 L.R.A. 817, 108 Am. St. Rep. 494; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; State ex rel. Robertson v. New England Furniture & Carpet Co. 126 Minn. 78, 147 N. W. 951, Ann. Cas. 1915D, 549; Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; State v. Jacobson, 80 Or. 648, 157 P. 1108, L.R.A.1916E, 1180; Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 26 Am. St. Rep. 659; State v. Burgoyne, 7 Lea (Tenn.) 173, 40 Am. Rep. 60; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L.R.A. 337; Houston v. State, 98 Wis. 481, 74 N. W. 111, 42 L.R.A. 39.

Annotation: 8 L.R.A. 854.

Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation. Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65.

See also Vol. 12, Subd. XIV.

See AGRICULTURE, Vol. 2, p. 435, § 40; ANIMALS, Vol. 2, p. 811, § 160.

[15] New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; Hardin-Wyandot Lighting Co. v. Upper Sandusky, 251 U. S. 173, 64 L. ed. 210, 40 S. Ct. 104; Lake Shore & M. S. R. Co. v. Clough, 242 U. S. 375, 61 L. ed. 374, 37 S. Ct. 144; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Mobile v. Orr, 181 Ala. 308, 61 So. 920, 45 L.R.A. (N.S.) 575; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Ex parte Lacey, 108 Cal. 326, 41 P. 411, 38 L.R.A. 640, 49 Am. St. Rep. 93; Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055, 51 L.R.A. 306, 78 Am. St. Rep. 296; Illinois C. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 22 A.L.R. 1322; Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; L'Hote v. New Orleans, 51 La. Ann. 93, 24 So. 608, 44 L.R.A. 90, affirmed in 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Baker v. Boston, 11 Pick. (Mass.) 184, 22 Am. Dec. 421; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; American Print Works v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Adamec v. Post, 273 N. Y. 250, 7 N. E. (2d) 120, 109 A.L.R. 1110; McIntosh v. Johnson, 211 N. Y. 265, 105 N. E. 414, L.R.A.1915D, 603; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033, L.R.A.1916E, 380, Ann. Cas. 1916B, 1149, affirmed in 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; Youngstown v. Kahn Bros. Bldg. Co. 112 Ohio St. 654, 148 N. E. 842, 43 A.L.R. 662; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 977, Ann. Cas. 1915B, 157; Philadelphia v. Scott, 81 Pa. 80, 22 Am. Rep. 738; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 26 Am. St. Rep. 659; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917D, 1114; Austin v. Thomas, 96 W. Va. 628, 123 S. E. 590, 38 A.L.R. 1490; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269. See also Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555.

Because of the foregoing principles, it is settled that as a general rule, regulations which the state authorizes in the proper exercise of its police power, with respect to the use of property, are entirely independent of any question of compensation for such use.[16] Hence, acts done in the proper exercise of the police power, which merely impair the use of property, do not constitute a taking within the meaning of the constitutional requirement as to the making of compensation for the taking of property for public use, and accordingly do not entitle the owner of such property to compensation from the state or its agents or give him any right of action for the injuries sustained.[17] It has even been held that under the police power no payment is made for a diminution in use of property, even though it amounts to an actual taking or destruction of the property.[18] Therefore, the exercise of the police power differs greatly from the exercise of the right of eminent domain, which involves the appropriation of private property to public use and requires that pecuniary compensation be made for the loss inflicted on the owner.[19]

The general rule must be restricted to cases of regulation, impairment, or destruction. The state, under the police power, cannot in any manner actually take and appropriate property for public use without compensation, for such action is repugnant to the constitutional guaranty that where private property is appropriated for public use, the owner shall receive reasonable compensation.[20] Thus, there is a vital difference, which is recognized by the authorities, between an act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and an act which not only declares the existence of a nuisance created by the condition of particular property, but in addition, and as the best means of accomplishing the end in view, authorizes the same property to be appropriated by the public.[1]

Recent cases have illustrated a tendency which, if it does not constitute a limitation upon the general rule, at least requires a careful examination of the factual situation involved in each individual case before allowing regulation or destruction of property without compensation. The Supreme Court has laid down the rule that there is a definite limit to the extent to which the

[16] State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.

A provision of a state Constitution that no man's property shall be taken by law without just compensation or, except in the case of the state, without such compensation being first assessed and tendered applies only to the taking of private property under the power of eminent domain, and does not restrain the legislature in the exercise of the police power of the state. Buckler v. Hilt, — Ind. —, 200 N. E. 219, 103 A.L.R. 901.

[17] Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1378; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 S. Ct. 464; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Youngstown v. Kahn Bros. Bldg. Co. 112 Ohio St. 654, 148 N. E. 842, 43 A.L.R. 662; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.

[18] White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

[19] Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120.

[20] Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43.

[1] Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43.

legislature may restrict the use of property under the police power. If regulation goes too far, it will be recognized as a taking.[2] This statement has been cited with approval by many state tribunals.[3] The general rule has also been held to be inapplicable in any instance in which private, personal, and property rights are interfered with, injured, or impaired in a manner, by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare.[4]

D. Subjects and Objects

1. Subjects

a. In General

§ 267. Generally.—Although constitutional guaranties cannot be transgressed,[5] it is settled that the possession and enjoyment of all rights are subject to the police power[6] which includes such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.[7] Consequently, both

[2] Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321.

For a discussion of what diminution or restriction constitutes a taking in violation of due process of law, see Vol. 12, Subd. XIV.

[3] Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Maxwell v. Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682; Standard Oil Co. v. Bowling Green, 244 Ky. 362, 50 S. W. (2d) 960, 86 A.L.R. 648; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

The police power does not justify the enactment of a law requiring the destruction of all trees and grass within 100 feet of a railroad. Vreeland v. Forest Park Reservation Commission, 82 N. J. Eq. 349, 87 A. 435, 46 L.R.A.(N.S.) 1062, Ann. Cas. 1915B, 1153.

[4] Maxwell v. Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682.

[5] See supra, §§ 259 et seq.

[6] Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; State ex rel. Davis v. Rose, 97 Fla. 710, 122 So. 225, citing R. C. L.; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A. (N.S.) 1115; Newark v. Watson, 56 N. J. L. 667, 29 A. 487, 24 L.R.A. 843; Titusville v. Brennan, 143 Pa. 642, 22 A. 893, 14 L.R.A. 100, 24 Am. St. Rep. 580, reversed on other grounds in 153 U. S. 289, 38 L. ed. 719, 14 S. Ct. 829; Re Ten Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; State v. Central Lumber Co. 24 S. D. 136, 123 N. W. 504, 42 L.R.A.(N.S.) 804, affirmed in 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92), citing R. C. L.; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

The constitutional guaranty of life, liberty, and property is subject to such restraints as are reasonably necessary for the public good. Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128.

The right to liberty, property, and the pursuit of happiness is subject to the reasonable exercise of the police power. Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086.

Charter rights, license rights, and contract rights are all subject to the inherent power of the government to protect the health, morals, and welfare of the public. Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270.

[7] Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Cason v. Florida Power Co. 74 Fla. 1, 76 So. 535, L.R.A. 1918A. 1034; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A. (N.S.) 739, 134 Am. St. Rep. 586; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179; Toledo Disposal Co. v. State, 89 Ohio St. 230, 106 N. E. 6, L.R.A.1915B, 1207;

persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, welfare, and prosperity of the people of the state;[8] everything contrary to public policy or inimical to the public interest is the subject of the exercise of the power.[9] The return for the sacrifice of private rights, however, should be the attainment of some public object of sufficient necessity and importance justly to warrant the exertion of the power.[10] Regulation to be valid must tend to some ulterior good to which the destruction or curtailment of rights is merely incidental.[11] Furthermore, legislation under the police power may infringe the constitutional guaranty as to liberty and property when it is extended to subjects not within its scope and purview,[12] and that cannot arbitrarily be made subject thereto which from its nature is not so.[13]

The consideration of the question as to whether an exercise of power over individuals or individual rights is valid involves many factors and depends largely upon the circumstances. There are, however, some basic principles which mark the extent of the power in a general way.[14] It cannot be disputed that, broadly speaking, the legislature may enact laws regulating, restraining, or prohibiting anything harmful to the welfare of the people, even though such regulation, restraint, or prohibition interferes with the liberty or property of an individual,[15] because it may consider the relation of rights, ac-

Williams v. Fourth Nat. Bank, 15 Okla. 477, 82 P. 496, 2 L.R.A.(N.S.) 334, 6 Ann. Cas. 970; Seattle v. Hinckley, 40 Wash. 468, 82 P. 747, 2 L.R.A.(N.S.) 398.

See generally, infra, §§ 302 et seq.

[8] California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L.R.A. 679, 49 Am. St. Rep. 222; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; Grown v. Cleveland, 125 Ohio St. 455, 181 N. E. 897, 84 A.L.R. 708; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719.

As to property rights as subject to police power, see infra, §§ 268, 269.

[9] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Sallsbury v. Equitable Purchasing Co. 177 Ky. 348, 197 S. W. 813, L.R.A.1918A, 1114; Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, 42 L.R.A. (N.S.) 1060, Ann. Cas. 1914D, 613; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842, writ of error dismissed in 207 U. S. 599, 52 L. ed. 358, 28 S. Ct. 253; State v. Holm, 139 Minn. 267, 166 N. W. 181, L.R.A.1918C, 304.

[10] Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

[11] State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

[12] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; State v. Latham, 115 Me. 176, 98 A. 578, L.R.A. 1917A, 480; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L.R.A. 131; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

See infra, §§ 302 et seq.

[13] Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558.

A state cannot by designating as "coercion" conduct which is not such in truth render criminal any normal and essentially innocent exercise of personal liberty or of property rights. Coppage v. Kansas, 236 U. S. 1, 54 L. ed. 441, 35 S. Ct. 240, L.R.A. 1915C, 960.

[14] See infra, notes 15–20, this section.

[15] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; State v. Fabbri, 98 Wash. 207, 167 P. 133, L.R.A.1918A, 416; State ex rel. Kellogg v.

commodate their coexistence, and, in the interest of the community, limit one right that others may be enjoyed.[16] The rights of the individual are, therefore, subordinate to the welfare of the general public.[17] If the police power is properly exercised, it is immaterial that it operates harshly on some individual[18] or causes him inconvenience or loss.[19] Citizens may, for the public good, under some circumstances, be restrained in their conduct even with reference to matters in themselves lawful and right.[20] It is equally well settled, however, that such laws cannot be sustained in the absence of some public necessity therefor,[1] but the police power must always be exercised within constitutional limitations.[2]

A more specific question than that relating generally to the effect of the police power upon rights is the exact extent to which and the circumstances under which the state may control the conduct of an individual. This has not been uniformly answered. Although it has been held that the police power does not extend to protect a citizen against his own rashness, and that the state does not have requisite interest in each citizen to protect him from the consequences of his own acts by health and welfare labor legislation,[3] the view more generally followed is that in matters in which the health and welfare of the individual directly affect the general welfare of the community, the state may exercise a certain amount of control over his personal rights. In a celebrated recent case Chief Justice Hughes has pointed out that the state retains an interest in the welfare of the individual, no matter how reckless he may be, for the whole is no greater than the sum of all of the parts; and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.[4]

Not only natural individuals, but also corporations and corporate rights are amenable to the police power.[5] Each state may, therefore, regulate the rela-

Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

16 Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118.

17 Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

18 Northwestern Laundry v. Des Moines, 239 U. S. 486, 60 L. ed. 396, 36 S. Ct. 206; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

19 Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; Urbach v. Omaha, 101 Neb. 314, 163 N. W. 307, L.R.A. 1917E, 1163; Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807.

20 State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336.

1 Maxwell v. Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

2 See supra, §§ 259 et seq.

3 Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269.

4 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

See also Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789, involving labor legislation, distinguishable on its facts from the earlier case of Com. v. Smith, 163 Ky. 227, 173 S. W. 340, L.R.A.1915D, 172 (involving the validity of a statute prohibiting the keeping or possession of intoxicating liquors, even though not intended for sale, in any place other than a private residence) in which the court said: "The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults or weaknesses which he keeps to himself, and which do not operate to the detriment of others, the state as such has no concern;" People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A. 1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214.

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's social statics." Holmes, J., dissenting in Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133.

5 Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 39 N. E. 651, 27 L.R.A. 298.

tive rights and duties of all persons and corporations within its jurisdiction.[6] The right to exercise the police power must not, moreover, be so construed as to permit corporations to infringe on the equal rights of individuals.[7]

Municipal corporations may, under their police power, regulate rights of all persons, natural or artificial.[8]

b. Effect on Property Rights

§ 268. Generally.—No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power[9] in order to secure the general safety, public welfare,[10] public convenience and general prosperity,[11] and the

6 Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 S. Ct. 465; State v. Smith, (Tex. Civ. App.) 47 S. W. (2d) 642, citing R. C. L.

7 Matthews v. St. Louis & S. F. R. Co. 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161, affirmed in 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243.

8 Chicago v. Pennsylvania Co. 252 Ill. 185, 96 N. E. 833, 36 L.R.A.(N.S.) 573, Ann. Cas. 1912D, 400; Chicago v. Chicago Union Traction Co. 199 Ill. 259, 65 N. E. 243, 59 L.R.A. 666.

For detailed discussion, see Municipal Corporations [Also 19 R. C. L. p. 798, §§ 106 et seq.].

9 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Eiger v. Garrity, 246 U. S. 97, 62 L. ed. 596, 38 S. Ct. 298; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178; Ex parte Lorenzen, 128 Cal. 431, 61 P. 68, 50 L.R.A. 55, 79 Am. St. Rep. 47; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A. 1917D, 926, Ann. Cas. 1917E, 685; Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L.R.A.(N.S.) 20, affirmed in 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; State v. Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L.R.A. 52; McGlone v. Womack, 129 Ky. 274, 111 S. W. 688, 17 L.R.A.(N.S.) 855; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; New Orleans v. Faber, 105 La. 208, 29 So. 507, 53 L.R.A. 165, 83 Am. St. Rep. 232; State v. Edwards, 86 Me. 102, 29 A. 947, 25 L.R.A. 504, 41 Am. St. Rep. 528; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L.R.A. 81, 12 Am. St. Rep. 561; People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549; Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L.R.A. 590; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A. 1916A, 950; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781; Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912; Owosso Carriage & Sleigh Co. v. McIntosh, 107 Tex. 307, 179 S. W. 257, L.R.A.1916B, 970; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; State v. Theriault, 70 Vt. 617, 41 A. 1020, 43 L.R.A. 290, 67 Am. St. Rep. 695; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32; Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L.R.A. (N.S.) 487; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842.

When the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246.

See infra, notes 10–14, this section.

10 **United States.**—Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Miller v. Schoene, 276 U. S. 272, 72 L. ed. 568, 48 S. Ct. 246; Eiger v. Garrity, 246 U. S. 97, 62 L. ed. 596, 38 S. Ct. 298; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201, reversing Harris v. Louisville, 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

Alabama.—Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L.R.A.(N.S.) 338; Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782.

Arkansas.—Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L.R.A. 238, 105 Am. St. Rep. 51.

California.—Re Barmore, 174 Cal. 286, 163 P. 50, L.R.A.1917D, 688; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, affirmed in 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

Connecticut. — State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131.

Dakota.—Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355.

District of Columbia.—Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532.

peace, good order, and morals of the community.[12] Accordingly, rights of property are subject to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient.[13] This rule is based upon the concept that all property within the jurisdiction of a state, however unqualified may be the title of the owner, is held on the implied condition or obligation that its use shall not be injurious to the equal right of others to the use and benefit of their own property.[14]

Florida.—Cason v. Florida Power Co. 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034.

Georgia.—Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516.

Illinois.—State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A. 1915D, 607, Ann. Cas. 1915C, 183; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A.(N.S.) 998; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229.

Indiana.—Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627.

Iowa.—State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

Kansas.—Oberlin v. Keys, 113 Kan. 421, 215 P. 283, citing R. C. L.; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.

Maine.—York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.; State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275.

Maryland.—Goldman v. Crowther, 147 Md. 282, 128 A. 59, 38 A.L.R. 1455; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742.

Massachusetts.—Com. v. Higgins, 277 Mass. 191, 178 N. E. 536, 79 A.L.R. 1304; Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82.

Michigan.—Bolden v. Grand Rapids Operating Corp. 239 Mich. 318, 214 N. W. 241, 53 A.L.R. 183, People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626.

Minnesota.—State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549.

Missouri.—State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A.(N.S.) 179; State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L.R.A. 798.

Montana.—Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Miles City v. State Bd. of Health, 39 Mont. 405, 102 P. 696, 25 L.R.A.(N.S.) 589.

New Hampshire.—Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A. 1916A, 950.

New Mexico.—State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A.1915B, 213, Ann. Cas. 1916D, 136.

New York.—People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707; Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L.R.A. 178, 19 Am. St. Rep. 490.

North Carolina.—Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321.

Ohio.—Pontiac Improv. Co. v. Cleveland Metropolitan Park Dist. 104 Ohio St. 447, 135 N. E. 635, 23 A.L.R. 866.

Oklahoma.—Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.

Pennsylvania.—Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

Rhode Island.—Re Ten Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; State v. Dalton, 22 R. I. 77, 48 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818.

South Dakota.—State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756.

Texas.—Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; McEachern v. Highland Park (Tex. Civ. App.) 34 S. W. (2d) 676 (affirmed in 124 Tex. 36, 73 S. W. (2d) 487) citing R. C. L.

Utah.—Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657.

Vermont.—State v. Speyer, 67 Vt. 502, 32 A. 476, 29 L.R.A. 573, 48 Am. St. Rep. 832.

Virginia.—Davenport v. Richmond, 81 Va. 636, 59 Am. Rep. 694.

Washington.—State v. Van Vlack, 101 Wash. 503, 172 P. 563, L.R.A.1918E, 108.

Wisconsin.—Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

New burdens may be imposed on property and new restrictions placed on its use when the public welfare demands them. State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327.

See also supra, § 251; infra, § 274.

[11] Smith v. New England Aircraft Co. 270 Mass. 511, 170 N. E. 385, 69 A.L.R. 300; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

[12] Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; L'Hote v. New Orleans, 51 La. Ann. 93, 24 So. 608, 44 L.R.A. 90, affirmed in 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.; Ford v. State, 85 Md. 465, 37 A. 172, 41 L.R.A. 551, 60 Am. St. Rep. 337; People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L.R.A. 853, 62 Am. St. Rep. 715; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549; Park v. State, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; Williams v. Fourth Nat. Bank, 15 Okla. 477, 82 P. 496, 2 L.R.A.(N.S.) 334, 6 Ann. Cas. 970; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345.

The exercise of such power is not restricted to instances where a nuisance already exists, but extends to prohibiting a proposed use of property which will injuriously affect public health or morals. Blackman Health Resort Co. v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516.

See infra, §§ 270 et seq.

[13] Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; Cincinnati v. Vester (C. C. A. 6th) 33 F. (2d) 242, 68 A.L.R. 831, affirmed in 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; Re Yun Quong, 159 Cal. 508, 114 P. 835, Ann. Cas. 1912C, 969; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Sifers v. Johnson, 7 Idaho, 798, 65 P. 709, 54 L.R.A. 785, 97 Am. St. Rep. 271; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318, writ of certiorari denied in 295 U. S. 734, 79 L. ed. 1682, 55 S. Ct. 645; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 698; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; People v. Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L.R.A.(N.S.) 473; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545, 8 L.R.A. 854, 26 Am. St. Rep. 659; Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100; State v. Speyer, 67 Vt. 502, 32 A. 476, 29 L.R.A. 573, 48 Am. St. Rep. 832; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

Annotation: 8 L.R.A. 854.

"Small limitations" only as to the enjoyment of property, having regard to the nature of the case, measure the scope of interference through the exercise of the police power. Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

[14] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Dutton v. Strong, 1 Black. (U. S.) 23, 17 L. ed. 29; Western U. Teleg. Co. v. New York (C. C.) 38 F. 552, 3 L.R.A. 449; Howard v. State, 154 Ark. 430, 242 S. W. 818, citing R. C. L.; Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56, affirmed in 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787, citing R. C. L.; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80; Pounds v. Darling, 75 Fla. 125, 77 So. 666, L.R.A.1918E, 949 (recognizing rule); Cason v. Florida Power Co. 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034; Sifers v. Johnson, 7 Idaho, 798, 65 P. 709, 54 L.R.A. 785, 97 Am. St. Rep. 271; Cook County v. Chicago, 311 Ill. 234, 142 N. E. 512, 31 A.L.R. 442; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Watson v. Mississippi River Power Co. 174 Iowa, 23, 156 N. W. 188, L.R.A.1916D, 101; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; O'Bryan v.

Because of the potency of the public interest which is deemed paramount under the foregoing rules,[15] it has been held that the Constitution cannot be invoked to prevent the exercise of the police power in the public interest to prevent acts or uses of property by one in a manner to injure his neighbor.[16] Moreover, the mere fact of pecuniary injury does not warrant the overthrow of police legislation,[17] and cost and inconvenience would have to be very great before they could become an element in the consideration of the exercise of police measures.[18]

The subordination of property rights to the just exercise of the police power has been said to be as complete as is the subjection of these rights to the proper exercise of the taxing power;[19] this implied condition exists quite irrespective of the source or character of the title.[20] This principle is in effect an application of the maxim which underlies the police power, "sic utere tuo ut alienum non lædas."[1]

As in other instances of its exercise, the police power is subject to limitations in its relation to property. Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest.[2] The right to acquire and own property and to deal with it and use it as the

Highland Apartment Co. 128 Ky. 282, 108 S. W. 257, 15 L.R.A.(N.S.) 419; State v. Canal & C. R. Co. 50 La. Ann. 1189, 24 So. 265, 56 L.R.A. 287, writ of error dismissed in (U. S.) 44 L. ed. 1221, 20 S. Ct. 1027; York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382, citing R. C. L.; Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819; Windsor v. State, 103 Md. 611, 64 A. 288, 12 L.R.A.(N.S.) 869; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201; Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D. 549; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L.R.A.(N.S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 332; State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Colville v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894; Conway v Monidah Trust, 47 Mont. 269, 132 P. 26, L.R.A.1915E, 500; Bullard v. Northern P. R. Co. 10 Mont. 168, 25 P. 120, 11 L.R.A. 246; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A.1916A, 950; State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; State v. Brooken, 19 N. M. 404, 143 P. 479, L.R.A. 1915B, 213, Ann. Cas. 1916D, 136; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; Gibbons v. Missouri, K. & T. R. Co. 142 Okla. 146, 285 P. 1040, citing R. C. L.; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; State v. McCrillis, 28 R. I. 165, 66 A. 301, 9 L.R.A.(N.S.) 635, 13 Ann. Cas. 701; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; Mapel v. John, 42 W. Va. 30, 24 S. E. 608, 32 L.R.A. 800, 57 Am. St. Rep. 839; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

Annotation: 73 Am. St. Rep. 211.

The right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership. Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111, 44 L.R.A.(N.S.) 228, Ann. Cas. 1914B, 824.

[15] See supra, notes 10–14, this section.

[16] Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819.

[17] L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788.

As to lack of compensation under police power, see supra, § 266.

[18] Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097.

[19] Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; Western U. Teleg. Co. v. New York (C. C.) 38 F. 552, 3 L.R.A. 449; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.

[20] Western U. Teleg. Co. v. New York (C. C.) 38 F. 552, 3 L.R.A. 449; Halter v. State, 74 Neb. 757, 105 N. W. 298, 7 L.R.A. (N.S.) 1079, 121 Am. St. Rep. 829, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.

[1] See supra, § 250.

[2] See cases infra, notes 4–6, this section.

owner chooses so long as the use harms nobody is a natural right to which the police power of the state is subordinate.[3] Its enjoyment cannot be interfered with or limited arbitrarily,[4] and it may be limited only to the extent necessary to subserve the public interest;[5] therefore, the owner has the constitutional right to make any use of it he desires so long as he does not endanger or threaten the safety, health, and comfort or general welfare of the public.[6] Thus, the police power may not be exercised to thwart or nullify restrictive covenants which are not detrimental to the public welfare.[7] Moreover, the police power, so far as it relates to property, is a power to regulate the use of property and is negative or inhibitory in its character. A man cannot be compelled under the police power to devote his property to any particular use, however advantageous to himself or beneficial to the public, although he may be compelled to refrain from any use which is detrimental to the public.[8]

§ 269. Applications of Rule.—Since under our theory of society property and property rights are held subject to a reasonable exercise of the police power in behalf of public interest,[9] the legislature may pass laws regulating the acquisition, enjoyment, and disposition of property,[10] even though in some respects these may operate as a restraint on individual freedom or the use of property.[11] Thus, the legislature may restrict a husband's right to alienate or encumber community property by requiring the wife's signature on any

[3] Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

[4] Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; New Orleans v. Lenfant, 126 La. 455, 52 So. 575, 29 L.R.A.(N.S.) 642.

A limitation on an owner's use of his property cannot be imposed for the benefit of other property owners. State ex rel. Sale v. Stahlman, 81 W. Va. 335, 94 S. E. 497, L.R.A.1918C, 77.

[5] Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

[6] Condon v. Forest Park, 278 Ill. 218, 115 N. E. 825, L.R.A.1917E, 314; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912.

An ordinance providing that all excavations for buildings shall be sheath-piled where it may be necessary to prevent the adjoining soil from caving in by reason of its own weight or the weight of a load upon it, and further providing that any person so excavating shall fully protect any adjoining land or buildings so that they shall remain as stable as before the excavation was commenced, is an unreasonable restriction on the use of private property and is not a valid exercise of the police power because it is applicable to cases where no public interest is involved. Young v. Mall Invest. Co. 172 Minn. 428, 215 N. W. 840, 55 A.L.R. 461. Annotation: 55 A.L.R. 464.

[7] Ludgate v. Somerville, 121 Or. 643, 256 P. 1043, 54 A.L.R. 837.

[8] Bowes v. Aberdeen, 58 Wash. 535, 109 P. 369, 30 L.R.A.(N.S.) 709.

[9] See supra, § 268.

[10] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L.R.A.(N.S.) 390; State v. Swenson, 172 Minn. 277, 215 N. W. 177, 54 A.L.R. 490; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.

As to the sale of stocks and other securities as limited by "blue sky laws," see infra, § 281.

As to the control of a state over the disposition or transmission of property within its confines, see also CONFLICT OF LAWS, supra, p. 328, § 30; p. 352, § 65; p. 476, § 169.

[11] Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; Southern Pub. Utilities Co. v. Charlotte, 179 N. C. 151, 101 S. E. 619, citing R. C. L.; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028, citing R. C. L.; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100.

instrument relating to the title.[12] It may also take away a husband's right to convey or encumber homestead property.[13]

Regulation under the police power includes the property both of private individuals[14] and of corporations.[15] Moreover, property of every kind is held subject to police regulations, including contracts[16] and rights in things intangible as well as tangible.[17]

2. Objects to Which Police Power Extends

§ 270. Generally.—The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or by such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as fairly to indicate the better will of the people in their social, industrial, and political development.[18]

The breadth and adaptability of the police power[19] as well as its power to cover the public needs[20] are of the greatest significance in determining the objects to which it extends. Thus, even though it may be difficult to formulate a satisfactory definition of the term "police power," there seems to be no doubt that the power extends to the protection of the lives, health, and property of the citizens, to the preservation of good order and the public morals,[1] to the

[12] Arnett v. Reade, 220 U. S. 311, 55 L. ed. 477, 31 S. Ct. 425, 36 L.R.A.(N.S.) 1040.
Annotation: 36 L.R.A.(N.S.) 1040.

[13] Bushnell v. Loomis, 234 Mo. 371, 137 S. W. 257, 36 L.R.A.(N.S.) 1029.
Annotation: 36 L.R.A.(N.S.) 1029.

[14] Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694.

[15] Merchants Exch. v. Missouri, 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 S. Ct. 569; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71.

[16] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 159; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Lindsay v. Anniston, 104 Ala. 257, 16 So. 545, 27 L.R.A. 436, 53 Am. St. Rep. 44; State ex rel. Davis v. Rose, 97 Fla. 710, 122 So. 225, citing R. C. L.; Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71; Shreveport v. Kansas City, S. & G. R. Co. 167 La. 771, 120 So. 290, 62 A.L.R. 1512; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

As to the regulation of liberty of contract generally under the police power, see infra, §§ 342, 345.

[17] State ex rel. Davis v. Rose, 97 Fla. 710, 122 So. 225, citing R. C. L.; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447.

There is no such inherent difference between property in land and tangible and intangible personal property as exempts the former from the operation of the police power in appropriate cases. Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289.

[18] State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A. 1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260.

[19] See supra, § 253.

[20] See supra, § 251.

[1] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 283, 46 Am. St. Rep. 92; American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Booth v. Indiana, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 30 S. Ct. 617; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; New Orleans v. Postek, 180 La. 1048, 158 So. 553, citing R. C. L.; State v. McCormick, 142 La. 530, 77 So. 288, L.R.A.1918C, 262; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Westport v. Mulholland, 159 Mo. 86, 60 S.

restraint and punishment of crime,[2] and to the preservation of the general welfare of the community.[3] In general it extends to the enactment of all such wholesome and reasonable laws not in conflict with the Constitution of the state or the United States as may be deemed conducive to the public good.[4] Thus, it has been said that the physical welfare of the citizen is a subject of such primary importance to the state and has such a direct relation to the general good as to make laws tending to promote that object proper under the police power.[5] It is not to be limited, however, to guarding merely the physical or material interests of a citizen. His moral, intellectual, and spiritual needs may also be considered.[6] Education is one of the purposes for which the police power may be exercised.[7] Moreover, the exercise of the power may include legislation to increase the industries of the state, develop its resources, and add to its welfare and prosperity.[8]

The frequency of the exercise of the police power and the variety of matters covered have evoked numerous judicial expressions as to the objects to which the power extends. Various phrases, differing but little in their ultimate concept, have been used to describe the matters in reference to which the power may be exercised. Thus, in a great many decisions it has been said that the police power extends to protection of the public health, safety, and morals;[9] to the securing of the public peace, good order, health, safety, morals,

W. 77, 53 L.R.A. 442; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603.

[2] Sutton v. New Jersey, 244 U. S. 258, 61 L. ed. 1117, 37 S. Ct. 508; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

[3] Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Smith v. State, 155 Ind. 611, 58 N. E. 1044, 51 L.R.A. 404; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616.

[4] State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

[5] New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A.1917D, 1; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707.

[6] Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400.

[7] Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523.

[8] Barber v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Virginia Development Co. v. Crozer Iron Co. 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[9] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 S. Ct. 252; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St. Rep. 82; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Re Clark, 65 Conn, 17, 31 A. 522, 28 L.R.A. 242; People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Smith v. People, 51 Colo. 270, 117 P. 612, 36 L.R.A.(N.S.) 158; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Chicago v. Pennsylvania Co. 252 Ill. 185, 96 N. E. 833, 36 L.R.A.(N.S.) 1081, Ann. Cas. 1912D, 400; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Com. v. Smith, 163 Ky. 227, 173 S. W. 340, L.R.A.1915D, 172; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45

and general welfare;[10] to the protection of the lives, limbs, health, comfort,

L.R.A. 433, 73 Am. St. Rep. 201; Ford v. State, 85 Md. 465, 37 A. 172, 41 L.R.A. 551, 60 Am. St. Rep. 337; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, affirmed in 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842, writ of error dismissed in 207 U. S. 599, 52 L. ed. 358, 28 S. Ct. 253; State v. Phillips, 109 Miss. 22, 67 So. 651, L.R.A.1915D, 530; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487, writ of error dismissed in 187 U. S. 356, 47 L. ed. 214, 23 S. Ct. 137; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; State v. Lipkin, 169 N. C. 265, 84 S. E. 340, L.R.A.1915F, 1018, Ann. Cas. 1917D, 137; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1918C, 1023, Ann. Cas. 1917C, 926; Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726, Ann. Cas. 1913D, 629; Mirick v. Gims, 79 Ohio St. 174, 86 N. E. 880, 20 L.R.A.(N.S.) 42; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A. 1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

Annotation: 104 Am. St. Rep. 638.

[10] **United States.**—Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 S. Ct. 934.

California.—Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am. St. Rep. 122.

Georgia.—Morris v. Columbus, 102 Ga. 792, 30 S. E. 850, 42 L.R.A. 175, 66 Am. St. Rep. 243.

Illinois.—Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112, 97 A.L.R. 1318; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Roumbos v. Chicago, 333 Ill. 70, 163 N. E. 361, 60 A.L.R. 87; Chicago v. Shaynin, 258 Ill. 69, 101 N. E. 224, L.R.A.(N.S.) 23; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 1; People v. Steele, 231 Ill. 340, 83 N. E. 237, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1027, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 197; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315.

Iowa.—State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360.

Kentucky.—Com. v. Smith, 163 Ky. 227, 173 S. W. 340, L.R.A.1915D, 172; Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, 43 L.R.A.(N.S.) 1060, Ann. Cas. 1914D, 613.

Maine.—State v. Old Tavern Farm, 131 Me. 468, 180 A. 473, 101 A.L.R. 810; Mc-Carthy v. Leeds, 115 Me. 134, 98 A. 72, L.R.A.1916E, 1212.

Massachusetts.—Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, affirmed in 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

Minnesota.—State ex rel. Baclgalupo v. O'Connor, 115 Minn. 339, 132 N. W. 303, 35 L.R.A.(N.S.) 1112, Ann. Cas. 1912D, 955.

Mississippi.—State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851.

New York.—State Bd. of Pharmacy v. Matthews, 197 N. Y. 353, 90 N. E. 966, 26 L.R.A.(N.S.) 1013; Boswell v. Security Mut. L. Ins. Co. 193 N. Y. 465, 86 N. E. 532, 19 L.R.A.(N.S.) 946; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389.

Ohio.—State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Cincinnati v. Harth, 101 Ohio St. 344, 128 N. E. 263, 13 A.L.R. 308; Schell v. DuBois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710; Bloomfield v. State, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A.(N.S.) 726, Ann. Cas. 1913D, 629; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A. (N.S.) 694; State ex rel. Atty. Gen. v. Capital City Dairy Co. 62 Ohio St. 350, 57 N. E. 62, 57 L.R.A. 181, affirmed in 183 U. S. 238, 46 L. ed. 171, 22 S. Ct. 120; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L.R.A. 854.

Oregon.—State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475.

Rhode Island.—State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818.

Tennessee.—Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

Utah.—Bountiful City v. De Luca, 77 Utah. 107, 292 P. 194, 72 A.L.R. 657; State v. Holden, 14 Utah. 96, 46 P. 1105, 37 L.R.A. 108, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

Virginia.—Farmville v. Walker, 101 Va. 323, 43 S. E. 558, 61 L.R.A. 125, 99 Am. St. Rep. 870.

Washington.—Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; Seattle v. Hinckley, 40 Wash. 468, 82 P. 747, 2 L.R.A.(N.S.) 398; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.

West Virginia.—Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

Wisconsin.—State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

[11] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243, affirming 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 10 S. Ct. 681; Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Slaughter House Cases, 16 Wall. 36, 21 L. ed. 394; Ft. Smith v. Hunt, 72 Ark. 556, 82 S. W. 163, 66 L.R.A. 238, 105 Am. St. Rep. 51; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; State v. Dolan, 13 Idaho, 693, 92 P. 995, 14 L.R.A. (N.S.) 1259; Condon v. Forest Park, 278 Ill. 218, 115 N. E. 825, L.R.A.1917E, 314; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, L.R.A.1917D, 15; State v. McCormick, 142 La. 580, 77 So. 288, L.R.A. 1918C, 262; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528; State v. Kofines, 33 R. I. 211, 80 A. 432, Ann. Cas. 1913C, 1120; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 1139, Ann. Cas. 1917D, 1114; State v. Van Vlack, 101 Wash. 503, 172 P. 563, L.R.A.1918E, 108.

Annotation: 28 L. ed. 923.

[12] People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 992.

The general assembly in the exercise of the police power has the same authority to pass an act for the general protection of the property of the public as to pass an act for the general protection of the property of an individual. People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997.

[13] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Chicago v. Pennsylvania Co. 252 Ill. 135, 96 N. E. 833, 36 L.R.A.(N.S.) 1081, Ann. Cas. 1912D, 400; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, 68 N. E. 933, 98 Am. St. Rep. 254; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 587, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360; Ware v. Wichita, 113 Kan. 153, 214 P. 99, citing R. C. L.; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A. 1918B, 374; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; State ex rel. Minneapolis v. St. Paul, M. & N. R. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 698; State ex rel. Beck v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Halter v. State, 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L.R.A. 178, 19 Am. St. Rep. 490; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Toledo Disposal Co. v. State, 89 Ohio St. 230, 106 N. E. 6, L.R.A.1915B, 1207; Re Ten-Hour Law, 24 R. I. 603, 54 A. 602, 61 L.R.A. 612; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; State ex rel. Davis-Smith v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L.R.A. 589, 98 Am. St. Rep. 933; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

and quiet of all persons and the protection of all property within the state,[11] including public property;[12] to the promotion of the comfort and welfare of society;[13] and, in addition, to the enhancement of the public convenience and

the general prosperity.[14] It has further been stated that as a general principle, legislation is valid which has for its object the promotion of the public health,

[14] **United States.**—Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 33 S. Ct. 76, 42 L.R.A.(N.S.) 1123, Ann. Cas. 1914B, 192; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Bown v. Walling, 204 U. S. 320, 51 L. ed. 503, 27 S. Ct. 292; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 S. Ct. 465.

Arkansas.—Central Clay Drainage Dist. v. Booser, 143 Ark. 18, 219 S. W. 336, 9 A.L.R. 1021; State v. Crowe, 130 Ark. 272, 197 S. W. 4, L.R.A.1918A, 567, Ann. Cas. 1918D, 460; Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47.

California.—Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804.

Colorado.—People v. Huff, 53 Colo. 80, 123 P. 651, 1 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177.

Connecticut.—Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57, 65 A.L.R. 939; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131.

Florida.—Atlantic Coast Line R. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047.

Indiana.—Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L.R.A. 768, 46 Am. St. Rep. 390.

Iowa.—Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 23 A.L.R. 1322.

Kansas.—Ware v. Wichita, 113 Kan. 153, 214 P. 99, citing R. C. L.; Winkler v. Anderson, 104 Kan. 1, 177 P. 521, 3 A.L.R. 268; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.

Kentucky.—Berea College v. Com. 123 Ky. 209, 94 S. W. 623, 134 Am. St. Rep. 344, 13 Ann. Cas. 337.

Maine.—Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

Maryland.—State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957.

Massachusetts.—Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276.

Michigan.—People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522.

Minnesota.—Blaisdell v. Home Bldg. & L. Asso. 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Chicago, M. & St. P. R. Co. v. Minneapolis, 115 Minn. 460, 133 N. W. 169, 51 L.R.A. (N.S.) 236, Ann. Cas. 1912D, 1029, affirmed in 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400.

New York.—Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 43 A.L.R. 651; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788.

North Carolina.—Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A. (N.S.) 321.

Ohio.—Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

Oklahoma.—State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765.

Texas.—Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

Washington.—State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500; State v. Pitney, 79 Wash. 603, 140 P. 918, Ann. Cas. 1916A, 209.

West Virginia.—Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081; Fruth v. Board of Affairs, 75 W. Va. 456, 84 S. E. 105, L.R.A.1915C, 981.

Wisconsin.—State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

The police power is not limited to regulations designed to promote the public health, public morals, or public safety, or to the suppression of what is offensive, disturbing, or unsanitary, but extends to dealing so with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 43 A.L.R. 651.

In State v. Louisville & N. R. Co. 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150, the Supreme Court of Mississippi accepted the general rule stated in the text above, holding that "the police power of the state is not limited to the suppression of what is disorderly, unsanitary, or offensive, but embraces regulations designed to promote the public convenience." The same court, however, in a later case, implied that this doctrine might be limited, at least in cases involving property rights. In the case of Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279, the court said: "We doubt, but do not here decide, that under our Constitution the state under the police power has the right to pass regulations purely to promote the public convenience or the general prosperity, to the disadvantage and detriment of the individual property holders."

safety, morals, convenience, or general welfare, or the prevention of fraud, immorality,[15] or oppression,[16] and that the police power includes the right of the state to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community,[17] the preservation of good order and the public morals,[18] the promotion of domestic tranquillity, and the comfort and quiet of all persons.[19]

The scope of the power and the objects to which it extends are limited to public needs of the general nature hereinabove discussed. Not every policy deemed desirable at certain times or by certain interests will fall within the proper scope of the police power. The Supreme Court has stated, for example, that if in a statute there is no object or purpose, express or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his

[15] People v. Wilber, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A.(N.S.) 357, 19 Ann. Cas. 626; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

The police power is generally the right to regulate, deal with, curtail, or even prohibit certain engagements, conduct, or acts tending to suppress or injuriously affect movements, measures, or schemes in furtherance of a permissible and authorized public policy. Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789.

[16] Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136.

[17] House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 S. Ct. 465; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185; New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. Rep. 544; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A.L.R. 1523; State v. Theriault, 70 Vt. 617, 41 A. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695.

It is incumbent upon the state to maintain social order. It is, therefore, proper for the legislature to enact all laws necessary to this end. State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495.

[18] Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 S. Ct. 666; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Standard Chemical & Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, L.R.A. 1918C, 522; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A. (N.S.) 438, Ann. Cas. 1915A, 292; Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L.R.A. 783; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217; Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A. (N.S.) 1147, 125 Am. St. Rep. 818; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

[19] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; State v. Canal & C. R. Co. 50 La. Ann. 1189, 24 So. 265, 56 L.R.A. 287, writ of error dismissed in (U. S.) 44 L. ed. 1221, 20 S. Ct. 1027; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; State v. Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34; Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637.

Annotation: 8 L.R.A. 854; 62 Am. St. Rep. 720.

financial independence, an unconstitutional interference with the normal exercise of personal liberty and property rights is the primary object of the statute. It is not an incident to the advancement of the general welfare and is barred by the Fourteenth Amendment.[20] Likewise, the legislature cannot create a monopoly under the guise of the power[1] or use such power merely to compel the payment of indebtedness,[2] to require one contracting to lay concrete pavements to give bonds for the faithful performance of the work and to protect customers against defects for a term of years,[3] or to authorize the release of persons who have contracted for highway construction under limited sections of a statute from their contracts because of the increase of price of labor and materials due to war.[4]

§ 271. Regulations in Interest of Public Health and Safety.—One of the most important fields of legislation in which a state may enact measures under the police power is that of regulations in the interest of public health and safety.[5] No exhaustive examination of all the matters which may be

[20] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960.

[1] State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L.R.A. 763, 82 Am. St. Rep. 489.

[2] Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255.

[3] State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[4] Davis Constr. Co. v. Bonne County, 192 Ind. 144, 132 N. E. 629, 21 A.L.R. 557.
Annotation: 21 A.L.R. 568.

[5] **United States.**—Bourjois v. Chapman, 301 U. S. 183, 81 L. ed. 1027, 57 S. Ct. 691; Bradley v. Public Utilities Commission, 289 U. S. 92, 77 L. ed. 1053, 53 S. Ct. 577, 85 A.L.R. 1131; New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144; Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57; Missouri, K. & T. R. Co. v. Oklahoma, 271 U. S. 303, 70 L. ed. 957, 46 S. Ct. 517; Michigan Pub. Utilities Co. v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105; Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Hardin-Wyandot Lighting Co. v. Upper Sandusky, 251 U. S. 173, 64 L. ed. 210, 40 S. Ct. 104; Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043, affirming 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629; Bowersock v. Smith, 243 U. S. 29, 61 L. ed. 572, 37 S. Ct. 371; O'Neill v. Leamer, 239 U. S. 244, 60 L. ed. 249, 36 S. Ct. 54; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 S. Ct. 892; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 60 L. ed. 305, 26 S. Ct. 144; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 S. Ct. 106; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 S. Ct. 616; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412.

Arizona.—State ex rel. Sullivan v. Price, — Ariz. —, 63 P. (2d) 653, 108 A.L.R. 1156; State ex rel. La Prade v. Smith, 43 Ariz. 131, 29 P. (2d) 718, 31 P. (2d) 102, 92 A.L.R. 168.

Arkansas.—McKee v. American Trust Co. 166 Ark. 480, 266 S. W. 293, citing R. C. L.; Central Clay Drainage Dist. v. Booser, 143 Ark. 18, 219 S. W. 336, 9 A.L.R. 1021.

California.—Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, affirmed in 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

Connecticut.—Levy v. Daniels' U-Drive Auto Renting Co. 108 Conn. 333, 143 A. 162, 61 A.L.R. 846.

Delaware. — Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D, 104.

Georgia.—Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A. 1917D, 926, Ann. Cas. 1917E, 685.

Illinois.—People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N. E. 815, 22 A.L.R. 835; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; Koy v. Chicago, 263 Ill. 122, 104 N. E. 1104, Ann. Cas. 1915C, 67; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292.

Indiana.—Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 65; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L.R.A. 787.

Iowa.—Robinson v. Bruce Rent-A-Ford Co. 205 Iowa, 261, 215 N. W. 724, 61 A.L.R. 851; Pugh v. Des Moines (Pugh v. Crawford) 176 Iowa, 593, 156 N. W. 892, L.R.A. 1917F, 345; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Beeks v. Dickinson County, 131 Iowa, 244, 108 N. W. 311, 6 L.R.A.(N.S.) 831, 9 Ann. Cas. 812.

Kansas.—Winkler v. Anderson, 104 Kan. 1, 177 P. 521, 3 A.L.R. 268.

Kentucky.—Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534; Board of Health v. Kollman, 156 Ky. 351, 160 S. W. 1052, 49 L.R.A.(N.S.) 354.

Louisiana.—State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262; Louisiana State Bd. of Agri. & Immigration v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A.1917C, 894, Ann. Cas. 1917E, 217; New Orleans v. Beck, 139 La. 595, 71 So. 883, L.R.A.1918A, 120; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546.

Maine.—State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; State v. Chandler, 131 Me. 262, 161 A. 148, 82 A.L.R. 1389, appeal dismissed in 287 U. S. 572, 77 L. ed. 502, 53 S. Ct. 116; State v. Starkey, 112 Me. 8, 90 A. 431, Ann. Cas. 1917A, 196; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396.

Maryland.—Keiningham v. Blake, 135 Md. 320, 109 A. 65, 8 A.L.R. 1066; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216.

Massachusetts.—Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760, 35 A.L.R. 945; Wheeler v. Boston, 233 Mass. 275, 123 N. E. 684, 15 A.L.R. 275; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659.

Michigan.—Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69, 61 A.L.R. 859; Pantlind v. Grand Rapids, 210 Mich. 18, 177 N. W. 302, 15 A.L.R. 280; Stapleton v. Independent Brewing Co. 198 Mich. 170, 164 N. W. 520, L.R.A.1918A, 916; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522.

Minnesota.—Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; State ex rel. Clara City v. Great Northern R. Co. 130 Minn. 480, 153 N. W. 879, L.R.A.1918D, 1153, affirmed in 246 U. S. 434, 62 L. ed. 817, 38 S. Ct. 346.

Mississippi.—Hartman v. May, 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408; L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421.

Missouri.—St. Louis v. Polar Wave Ice & Fuel Co. 317 Mo. 907, 296 S. W. 993, 54 A.L.R. 1082; State v. Scullin-Gallagher Iron & Steel Co. 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918E, 620.

Montana.—Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

Nebraska.—Arrigo v. Hyers, 98 Neb. 134, 152 N. W. 319, L.R.A.1917A, 1116; Whelan v. Daniels, 94 Neb. 642, 143 N. W. 929, 48 L.R.A.(N.S.) 979; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825.

Nevada.—State v. Park, 42 Nev. 386, 178 P. 383, 3 A.L.R. 75.

New Hampshire.—State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996.

New York.—E. Fougera & Co. v. New York, 224 N. Y. 269, 120 N. E. 642, 1 A.L.R. 1467; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; People v. Ekerold, 211 N. Y. 386, 105 N. E. 670, L.R.A.1915D, 223, Ann. Cas. 1915C, 552; Rochester v. Gutherlett, 211 N. Y. 309, 105 N. E. 548, L.R.A.1915D, 209, Ann. Cas. 1915C, 483; McIntosh v. Johnson, 211 N. Y. 265, 105 N. E. 414, L.R.A.1915D, 603; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781; Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L.R.A. 548, 79 Am. St. Rep. 659.

North Carolina.—Durham v. Southern R. Co. 185 N. C. 240, 117 S. E. 17, 35 A.L.R. 1313, affirmed in 266 U. S. 178, 69 L. ed. 231, 45 S. Ct. 51; Shelby v. Cleveland Mill & Power Co. 155 N. C. 196, 71 S. E. 218, 35 L.R.A.(N.S.) 488, Ann. Cas. 1912C, 179; State v. Whitlock, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765.

North Dakota.—State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A. 1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60.

Ohio.—Pontiac Improv. Co. v. Cleveland Metropolitan Park. Dist. 104 Ohio St. 447, 135 N. E. 635, 23 A.L.R. 866; Yee Bow v. Cleveland, 99 Ohio St. 269, 124 N. E. 132, 12 A.L.R. 1424, writ of error dismissed in 255 U. S. 578, 65 L. ed. 794, 41 S. Ct. 320; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, L.R.A.1917D, 641, Ann. Cas. 1918B, 402; Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L.R.A.1917A, 710; Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164; Toledo Disposal Co. v. State, 89 Ohio St. 230, 106 N. E. 6, L.R.A.1915B, 1207; Allen v. Smith, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611.

Oklahoma. — Walcher v. Norman First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593; Bishop v. Tulsa, 21 Okla. Crim Rep. 457, 209 P. 228, 27 A.L.R. 1008.

Oregon.—Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

regulated under this object of the police power is practicable, but under it

laws may be passed providing for drainage and sewer systems,[6] for the removal of large bodies of stagnant water which produce breeders of disease,[7] for irrigation and reclamation,[8] for levee, flood control, and conservancy acts,[9] for the protection of a municipal water supply,[10] and for the protection of a watershed.[11] Similar valid police regulations are those requiring the owners of a lot which has been declared to be dangerous to the public health to fill it up to a certain level;[12] dealing with the evils of overcrowded tenements and unhealthy slums;[13] requiring the plumbing installed in buildings to meet certain specifications;[14] making it a penal offense to discharge any refuse matter into a running stream;[15] forbidding anyone to make use of a polluted water

South Dakota.—State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719; Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760.

Tennessee.—State v. Norvell, 137 Tenn. 82, 191 S. W. 536, L.R.A.1917D, 586; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A. 1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

Texas.—St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A. 1917B, 1108; Ex parte Stout, 82 Tex. Crim. Rep. 183, 198 S. W. 967, L.R.A.1918C, 277.

Utah.—Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

Vermont.—Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A. (N.S.) 190, Ann. Cas. 1913B, 218.

Virginia.—Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

Washington. — Hacker v. Barnes, 166 Wash. 558, 7 P. (2d) 607, 80 A.L.R. 1212; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

West Virginia.—Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361; Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081; State ex rel. Sale v. Stahlman, 81 W. Va. 335, 94 S. E. 497, L.R.A.1918C, 77; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

Wisconsin. — State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274; Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842.

Wyoming.—State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

"**In the application of the police power** of the state, the matters of health and safety stand on the same plane, as is well known." Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

Police power extends not only to things intrinsically dangerous, but to those that may be so used as to be injurious or dangerous to life. Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 10 S. Ct. 681.

See HEALTH [Also 12 R. C. L. p. 1264, § 2].

[6] Lake Shore & M. S. R. Co. v. Clough, 242 U. S. 375, 61 L. ed. 374, 37 S. Ct. 144; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 S. Ct. 364; Hutchinson v. Valdosta, 227 U. S. 303, 57 L. ed. 520, 33 S. Ct. 290; New Orleans Gas-light Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 S. Ct. 471; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 S. Ct. 750; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 S. Ct. 663; Fristoe v. Crowley, 142 La. 393, 76 So. 812, L.R.A.1918C, 254; State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52.

See also DRAINS AND SEWERS [Also 9 R. C. L. p. 620, §§ 4, 5]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 832].

[7] Bradbury v. Vandalia Levee & Drainage Dist. 236 Ill. 36, 86 N. E. 163, 19 L.R.A. (N.S.) 991, 15 Ann. Cas. 904.

[8] O'Neill v. Teamer, 239 U. S. 244, 60 L. ed. 249, 36 S. Ct. 54; Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

See IRRIGATION [Also 15 R. C. L. p. 495, § 46].

[9] Gutierrez v. Middle Rio Grande Conservancy Dist. 34 N. M. 346, 282 P. 1, 70 A.L.R. 1261, writ of certiorari denied in 280 U. S. 610, 74 L. ed. 653, 50 S. Ct. 158.

Annotation: 70 A.L.R. 1275 et seq.

See WATERS [Also 27 R. C. L. p. 1052].

[10] Annotation: 72 A.L.R. 676.

A statute forbidding a riparian owner on a pond from which a municipal water supply is taken to bathe in the pond is a valid exercise of the police power. State v. Morse, 84 Vt. 387, 80 A. 786, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218. Annotation: 72 A.L.R. 676.

See WATERWORKS [Also 27 R. C. L. p. 1405, § 24].

[11] Perley v. North Carolina, 249 U. S. 510, 63 L. ed. 735, 39 S. Ct. 357.

Annotation: 72 A.L.R. 674.

[12] Charleston v. Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776.

[13] Opinion of Justices, 211 Mass. 624, 98 N. E. 611, 42 L.R.A.(N.S.) 221.

[14] New Castle City v. Withers, 291 Pa. 216, 139 A. 860, 57 A.L.R. 132.

See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 832, § 137].

[15] People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177; Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A.(N.S.) 321; Bountiful City v. De Luca, 77 Utah, 107, 292 P. 194, 72 A.L.R. 657; State v. Haskell, 84 Vt. 429, 79 A. 852, 34 L.R.A.(N.S.) 286; State v. Southern Coal & Transp. Co. 71 W. Va. 470, 76 S. E. 970, 43 L.R.A.(N.S.) 401.

Annotation: 7 L.R.A.(N.S.) 321; 34 L.R.A.(N.S.) 286; Ann. Cas. 1914A, 1180.

See also WATERS [Also 27 R. C. L. p. 1234, § 144].

[16] State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496.

Annotation: 23 L.R.A.(N.S.) 766.

[17] State v. Robb, 100 Me. 180, 60 A. 874, 4 Ann. Cas. 275; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L.R.A. 895, 97 Am. St. Rep. 676.

See also HEALTH [Also 12 R. C. L. p. 1280, §§ 19 et seq.]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 824, § 128; NUISANCES [Also 20 R. C. L. p. 423, §§ 39, 40].

[18] St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218.

See HEALTH [Also 12 R. C. L. p. 1280, § 19]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 817, § 122]; NUISANCES [Also 20 R. C. L. p. 391, § 13, p. 442, § 56].

[19] Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 10 S. Ct. 681; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Per Taney, Ch. J., Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. ed. 256; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. ed. 648; Re McGee, 105 Kan. 574, 185 P. 14, 8 A.L.R. 831; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 56 L.R.A. 795, 72 Am. St. Rep. 458; Ex parte Hardcastle, 84 Tex. Crim. Rep. 463, 208 S. W. 531, 2 A.L.R. 1539.

See HEALTH [Also 12 R. C. L. p. 1289, §§ 29 et seq.]; MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 825, § 129].

[20] Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 40 L. ed. 1209, 22 S. Ct. 811.

supply for drinking purposes;[16] providing for the collection and removal of garbage, refuse, and offal in thickly populated cities;[17] and, in general, prohibiting the maintenance of any unsanitary condition which amounts to a nuisance.[18]

The protection of the public health and safety is the basis of much valid regulation over persons. This broad field includes not only legislation relating to the prevention and curtailment of disease through quarantine,[19] when not in conflict with Federal regulations on the subject,[20] vaccination,[1] and segregation in special hospitals of persons suffering from contagious and infectious illnesses,[2] but also measures relating to eugenics and the maintenance of a healthy, normal, and socially sound populace. Thus, it has been held that the requiring of a certificate of freedom from venereal disease as a condition to marriage is within the police power.[3] Moreover, although there is no complete accord among the authorities, the trend of the recent cases is to sustain as valid legislation providing for the sterilization of certain types of convicted criminals, criminally insane persons, and feeble-minded persons,[4] although, of course, proper notice and hearing as required by the due process clause must be provided.[5]

Health regulations under the police power cover many other subjects besides human beings. Valid laws of this nature include inspection and quarantine regulations in reference to goods, freight,[6] animals, and livestock.[7]

[1] Zucht v. King, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Barbour v. State, 146 Ga. 667, 92 S. E. 70, 2 A.L.R. 1095, affirmed in 249 U. S. 454, 63 L. ed. 704, 39 S. Ct. 316.

See HEALTH [Also 12 R. C. L. p. 1287, §§ 27, 28]; SCHOOLS [Also 24 R. C. L. p. 631, §§ 89, 90].

[2] State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262.

See HOSPITALS AND ASYLUMS [Also 13 R. C. L. p. 954, § 17].

[3] Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040.

Annotation: 52 L.R.A.(N.S.) 778.

[4] Buck v. Bell, 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584, affirming 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855 (feeble-minded); Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515 (feeble-minded).

Annotation: 40 A.L.R. 535, s. 51 A.L.R. 862, and 87 A.L.R. 242.

See also CRIMINAL LAW; INSANE AND OTHER INCOMPETENT PERSONS.

[5] Brewer v. Valk, 204 N. C. 186, 167 S. E. 638, 87 A.L.R. 237.

See Vol. 12, Subd. XIV.

[6] Train v. Boston Disinfecting Co. 144 Mass. 52, 11 N. E. 929, 59 Am. Rep. 113.

Annotation: 59 Am. Rep. 116.

[7] Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 S. Ct. 485, 14 Ann. Cas. 1101; Smith v. St. Louis & S. W. R. Co. 181 U. S. 248, 45 L. ed. 847, 21 S. Ct. 603; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 9 S. Ct. 277; McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508; North v. Woodland, 12 Idaho, 50, 85 P. 215, 6 L.R.A.(N.S.) 921; State v. Rasmussen, 7 Idaho, 1, 59 P. 933, 52 L.R.A. 78, 97 Am. St. Rep. 234, affirmed

Moreover, a state may provide for the destruction of diseased animals,[8] noxious weeds,[9] and trees attacked by infectious diseases.[10]

Varied provisions for maintaining public safety are sustained under the police power. For example, the regulation of the manufacture, keeping, storing, and sale of high explosives is a proper exercise of the power.[11] Laws safeguarding the public from dangers of mechanized traffic are also valid. Thus, a municipal ordinance requiring resident owners of motor vehicles, as a condition of the right to operate upon the streets of a city, to submit the vehicles to a semiannual inspection for the purpose of determining whether they conform to statutory requirements as to equipment for safe operation and the statute authorizing the adoption of such an ordinance are valid.[12]

§ 272. Regulations in Behalf of Public Morals.—A cardinal principle involved in the exercise of the police power establishes the well-settled rule that the police power may be exerted to preserve and protect the public morals.[13]

in 181 U. S. 198, 45 L. ed. 820, 21 S. Ct. 594; State v. Starkey, 112 Me. 8, 90 A. 431; Ann. Cas. 1917A, 196; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L.R.A.(N.S.) 138.

Annotation: 65 A.L.R. 539, 540 et seq.; 6 L.R.A.(N.S.) 922.

See generally ANIMALS, Vol. 2, p. 807, §§ 157 et seq.

[8] Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.

Annotation: 8 A.L.R. 69.

See ANIMALS, Vol. 2, p. 810, § 160.

[9] Com. v. Watson, 223 Ky. 427, 3 S. W. (2d) 1077, 58 A.L.R. 212; St. Louis v. Galt, 179 Mo. 8, 77 S. W. 876, 63 L.R.A. 778; Northern P. R. Co. v. Adams County, 78 Wash. 53, 138 P. 307, 51 L.R.A.(N.S.) 274; Wedemeyer v. Crouch, 68 Wash. 14, 122 P. 366, 43 L.R.A.(N.S.) 1090.

Annotation: 12 A.L.R. 1143.

See AGRICULTURE, Vol. 2, p. 437, § 41.

[10] State v. Main, 69 Conn. 123, 37 A. 80, 36 L.R.A. 623, 61 Am. St. Rep. 30; Louisiana State Bd. of Agri. & Immigration v. Tanzmann, 140 La. 756, 73 So. 854, L.R.A. 1917C, 894, Ann. Cas. 1917C, 217; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121. See also Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894.

Annotation: 12 A.L.R. 1136 et seq.

See AGRICULTURE, Vol. 2, p. 433, §§ 39 et seq.

[11] Miller v. Clarke, 47 R. I. 13, 129 A. 606, 42 A.L.R. 1204.

See EXPLOSIONS AND EXPLOSIVES [Also 11 R. C. L. p. 655, § 5].

[12] Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789.

Annotation: 106 A.L.R. 795.

See also AUTOMOBILES, Vol. 5, p. 528, § 19, p. 554, § 638.

[13] Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Cosmopolitan Club v. Virginia, 208 U. S. 373, 52 L. ed. 536, 28 S. Ct. 394; Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. ed. 269, 21 S. Ct. 201; L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85; Van Winkle v. State, 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Braddy v. Milledgeville, 74 Ga. 516, 58 Am. Rep. 443; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; Chicago v. Shaynin, 258 Ill. 69, 101 N. E. 224, 45 L.R.A.(N.S.) 23; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 65; Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L.R.A. 268, 30 Am. St. Rep. 214; Winkler v. Anderson, 104 Kan. 1, 177 P. 521, 3 A.L.R. 268; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; Jonesville v. Boyd, 161 La. 278, 108 So. 481, 48 A.L.R. 142; State v. McCormick, 142 La. 580, 77 So. 288, L.R.A. 1918C, 262; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Ford v. State, 85 Md. 465, 37 A. 172, 41 L.R.A. 551, 60 Am. St. Rep. 337; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659; Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; State ex rel. Robertson v. New England Furniture & Carpet Co. (State ex rel. Robertson v. Lane) 126 Minn. 78, 147 N. W. 951, 52 L.R.A.(N.S.) 932, Ann. Cas. 1915D, 549; Hill v. Rae, 52 Mont. 378, 158 P. 826, L.R.A. 1917A, 495, Ann. Cas. 1917E, 210; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Walcher v. First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 1 S. W. 1172, Ann. Cas. 1914D, 834; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; Tacoma v. Keisel, 68 Wash. 685, 124 P. 137, 40 L.R.A.(N.S.) 757; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361; Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

The legislature has power to declare that certain acts shall constitute a criminal offense, on the ground that they endanger public morals, although such acts may not be sufficient to sustain an indictment at common law for nuisance or libel. State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124.

"The police power was reserved to the states to promote, and not to corrupt, public morals." State ex rel. Caster v. Dickinson, 101 Kan. 660, 168 P. 838, L.R.A. 1918B, 534.

As to the prevention of cruelty to animals as within the police power to conserve public morals, see ANIMALS, Vol. 2, p. 813, § 162.

[14] Dwyer v. People, 82 Colo. 574, 261 P. 858, citing R. C. L.; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State v. Williams (State v. Thompson) 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468.

[15] See infra, notes 16–3, this section.

[16] Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 S. Ct. 31; Ah Sin v. Wittman, 198 U. S. 500, 49 L. ed. 1142, 25 S. Ct. 756; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128.

See also GAMING [Also 12 R. C. L. p. 709, §§ 4 et seq.].

[17] Western Turf Asso. v. Greenburg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L.R.A. 213, 51 Am. St. Rep. 174; State Racing Commission v. Latonia Agri. Asso. 136 Ky. 173, 123 S. W. 681, 25 L.R.A.(N.S.) 905; Eros v. Powell, 137 La. 342, 63 So. 632, citing R. C. L.; State v. Williams, 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468.

Annotation: 25 L.R.A.(N.S.) 905; L.R.A. 1917E, 318.

See GAMING [Also 12 R. C. L. p. 718, § 17].

[18] State v. Burgdoefer, 107 Mo. 1, 17 S. W. 646, 14 L.R.A. 846.

[19] Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State v. Williams, 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468.

See GAMING [Also 12 R. C. L. p. 719, §§ 18, 19].

[20] State v. Sherow, 87 Kan. 235, 123 P. 866, Ann. Cas. 1913D, 1050; Burlingame v. Thompson, 74 Kan. 393, 86 P. 449, 11 Ann. Cas. 64; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; Re Jones, 4 Okla. Crim. Rep. 74, 109 P. 570, 31 L.R.A.(N.S.) 548, 140 Am. St. Rep. 655; Flanagan v. Petersburg, 108 W. Va. 111, 150 S. E. 382, citing R. C. L.

Annotation: L.R.A.1917E, 318.

For a general discussion of pool rooms, see THEATERS, SHOWS, EXHIBITIONS, AND PUBLIC RESORTS [Also 26 R. C. L. p. 698, § 4].

[1] Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Ford v. State, 85 Md. 465, 37 A. 172, 41 L.R.A. 551, 60 Am. St. Rep. 337; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Moore v. State, 48 Miss. 147, 12 Am. Rep. 367; State v. Lipkin, 169 N. C. 265, 84 S. E. 340, L.R.A.1915F, 1018, Ann. Cas. 1917D, 137.

See LOTTERIES [Also 17 R. C. L. p. 1213, § 3].

[2] Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56 (affirmed in 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168); Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.

[3] Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Booth v. People, 186 Ill. 43, 57 N. E. 1129, 50 L.R.A. 762, 78 Am. St. Rep. 229; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A. (N.S.) 994; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.

See GAMING [Also 12 R. C. L. p. 751, § 56].

Therefore, any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry is a legitimate subject for regulation or prohibition by the state.[14]

A great many situations arise in the complexity of modern society in which the police power is invoked for the purpose of preventing vicious practices.[15] On this principle it is concededly within the police power of the state to suppress gambling in all its forms,[16] including horse racing,[17] wagering of all kinds[18] such as bookmaking and pool selling,[19] keeping pool tables for hire,[20] lotteries,[1] buying and selling stocks on margin,[2] and dealing in options or futures.[3] Furthermore, to suppress gambling the state may provide that the

owner of a building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used to pay a judgment against those who won the money.[4]

Activities of such a nature as to engender vice, indecency, and social corruption are within the police power to regulate.[5] Such power clearly extends to the regulation or suppression of houses of prostitution,[6] and enactments fixing the limits beyond which such houses shall not be permitted have been upheld as merely securing public order, decency, and morals, and as not violating any of the guaranties of the rights of person and property contained in Federal and state Constitutions.[7] The penalizing for associating with prostitutes and for committing vagrant loitering[8] and the punishment of vagrancy in general[9] and of prostitution and pandering[10] are generally within the purview of this phase of the police power. Moreover, the state may also suppress the publication and sale of obscene literature.[11] Although the subjects concerned are not of the inherently vicious nature of the foregoing practices, the power also extends, for purposes of preserving morality, to the censorship of moving pictures[12] and the regulation of dance halls.[13]

The exercise of police measures under the head of conserving public morality is only valid where the matter sought to be regulated actually affects the public morals. This test governs in determining the validity of regulation of simple games. The fact that a game has attractions which induce players to practice it does not change its character to one of amusement or entertainment provided for the public; and if it is a game of a healthful and harmless nature such as golf or lawn tennis, it is not a subject for the exercise of police power.[14] Miniature golf courses, however, have been held to be subject to regulation on the theory that they not only are partially of the nature of an amusement, but cause congestion and other conditions affecting the public interest.[15]

There must be a reasonable connection between the affecting of public morality and a regulation in order for the regulation to be valid. Hence, although legislation forbidding the publication of information concerning the making of bets by stating betting odds is valid as to publication of such information prior to the taking place of the event concerning which the bets will be made, it is

[4] Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 S. Ct. 31; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156.

[5] See infra, notes 6–11, this section.

[6] Barbour v. State, 146 Ga. 667, 92 S. E. 70, 2 A.L.R. 1095, affirmed in 249 U. S. 454, 63 L. ed. 704, 39 S. Ct. 316; People ex rel. Thrasher v. Smith, 275 Ill. 256, 114 N. E. 31, L.R.A.1917B, 1075; L'Hote v. New Orleans, 51 La. Ann. 93, 24 So. 608, 44 L.R.A. 90; State v. Williams, 160 Mo. 333, 60 S. W. 1077, 54 L.R.A. 950, 83 Am. St. Rep. 468; State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.
Annotation: L.R.A.1917B, 1078.
See DISORDERLY HOUSES [Also 9 R. C. L. p. 220, § 5].

[7] L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788, affirming 51 La. Ann. 93, 24 So. 608, 44 L.R.A. 90.

[8] State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262.

[9] See VAGRANCY.

[10] Annotation: 74 A.L.R. 311.
See PROSTITUTION.

[11] Com. v. McCance, 164 Mass. 162, 41 N. E. 133, 29 L.R.A. 61. See also Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275.

[12] Mutual Film Corp. v. Hodges, 236 U. S. 248, 59 L. ed. 561, 35 S. Ct. 393; Mutual Film Co. v. Industrial Commission, 236 U. S. 247, 59 L. ed. 561, 35 S. Ct. 393; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296.
Annotation: 64 A.L.R. 505.
See THEATERS, SHOWS, EXHIBITIONS, AND PUBLIC RESORTS [Also 26 R. C. L. p. 702, § 7].

[13] See infra, § 286.

[14] Condon v. Forest Park, 278 Ill. 218, 115 N. E. 825, L.R.A.1917E, 314.
Annotation: L.R.A.1917E, 318.

[15] Jaffarian v. Building Comr. (Jaffarian v. Kelley) 275 Mass. 267, 175 N. E. 641, 74 A.L.R. 403.
Annotation: 74 A.L.R. 406.

unconstitutional in seeking to forbid the publication of such information after the event has already taken place.[16]

§ 273. Regulations for Prevention of Fraud.—The police power of the state is not limited to regulations necessary for the preservation of good order or the public health and safety. The prevention of fraud and deceit, and cheating and imposition, is equally within the power.[17] Therefore, a state may prescribe all such regulations as, in its judgment, will secure or tend to secure the people against the consequences of fraud[18] and may institute any reasonable preventive remedy required by the frequency of fraud, or the difficulty experienced by individuals in circumventing it, especially when other means have not proved to be efficacious.[19]

The use of the police power to prevent imposition upon the public is very

[16] Parkes v. Judges of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128.
Annotation: 47 A.L.R. 1135.

[17] Merchants Exch. v. Missouri, 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787, citing R. C. L.; Newman v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; People v. Freeman, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A.L.R. 1386; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28; State v. Starkey, 112 Me. 8, 90 A. 431, Ann. Cas. 1917A, 196; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; People v. Wagner, 86 Mich. 594, 49 N. W. 609, 13 L.R.A. 286, 24 Am. St. Rep. 141; State v. Bartles Oil Co. 132 Minn. 138, 155 N. W. 1035, L.R.A.1916D, 193; Kanne v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 137 N. W. 170, 41 L.R.A.(N.S.) 1041; Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 N. W. 127, 41 L.R.A.(N.S.) 149; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; State v. Co-operative Store Co. 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.; State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.
Annotation: 24 Am. St. Rep. 146.
The police power relates not merely to the public health and to public physical safety, but also to public financial safety. Laws may be passed within the police power to protect the public from financial loss. Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

[18] Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Gregory v. Hecke, 73 Cal. App. 268, 238 P. 787, citing R. C. L.; G. S. Johnson Co. v. Beloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; State v. Hanson, 118 Minn. 85, 136 N. W. 412, 40 L.R.A.(N.S.) 865, Ann. Cas. 1913E, 405; People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Roman v. Lobe, 243 N. Y. 51, 152 N. E. 461, 50 A.L.R. 1329; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. W. 115, 3 A.L.R. 1260; People v. Guiton, 210 N. Y. 1, 103 N. E. 773, L.R.A. 1915A, 757; People v. Luhrs, 195 N. Y. 377, 89 N. E. 171, 25 L.R.A.(N.S.) 473; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033, L.R.A.1916E, 380, Ann. Cas. 1916B, 1149, affirmed in 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 N. W. 127, 41 L.R.A.(N.S.) 149; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; Hale v. Kreisel, 194 Wis. 271, 215 N. W. 227, 56 A.L.R. 780.
The utmost limit of reasonable regulation in the matter of supervising and controlling charities under the police power is reached by acts protecting the public from charlatans and impostors, insuring knowledge on the part of the donors of the purposes to which their contributions may be put, coupled with adequate safeguards against malversation as to the funds received. Re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas. 1917D, 1127.

[19] State v. De Verges, 153 La. 349, 95 So. 805, 27 A.L.R. 1526; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; People v. Wagner, 86 Mich. 594, 49 N. W. 609, 13 L.R.A. 286, 24 Am. St. Rep. 141.

broad, affecting many commonplace transactions.[20] It includes the prevention of deception as to the character or quality of goods offered for sale,[1] as by the prohibition of the sale of deceitful imitations of articles of food in general use,[2] the requirement that goods sold should bear labels showing the ingredients, the regulation of weights and measures,[3] the prohibition of the use of coloring matter in articles of food—for example, substitutes for butter—whereby purchasers might be deceived into believing that they are purchasing a genuine article,[4] and the regulation of the size of loaves of bread.[5] It is also a proper exercise of the police power to regulate the wearing of badges or emblems of societies and to prohibit the wearing thereof by persons who are not members of the society represented.[6]

The fraud-preventing exercise of the police power is often used as a basis for the prohibition of impolitic and collusive litigation. Thus, a statute limiting the right of recovery of an automobile guest for personal injuries as against the host to injuries received only through his gross negligence or wilful and wanton misconduct is a valid exercise of the police power to prevent

20 See cases cited infra, notes 1–5, this section.

1 Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; People v. Jenkins, 202 N. Y. 53, 94 N. E. 1065, 35 L.R.A.(N.S.) 1079 (holding, however, that an ordinance imposing a license tax on transient merchants did not aim at preventing false representations by them as to the goods offered for sale).

As to bulk sales laws and "blue sky laws," see infra, § 281.

2 Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 15 S. Ct. 154; State v. Durein, 70 Kan. 1, 78 P. 152, 15 L.R.A.(N.S.) 908, affirmed in 208 U. S. 613, 52 L. ed. 645, 28 S. Ct. 567; New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761, Ann. Cas. 1918B, 1032; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; State v. Hanson, 118 Minn. 85, 136 N. W. 412, 40 L.R.A.(N.S.) 865, Ann. Cas. 1913E, 405; People v. Guiton, 210 N. Y. 1, 103 N. E. 773, L.R.A.1915A, 757.

See Food [Also 11 R. C. L. p. 1105, § 11].

3 National Fertilizer Asso. v. Bradley, 301 U. S. 178, 81 L. ed. 990, 57 S. Ct. 748; Pacific States Box & Basket Co. v. White, 296 U. S. 176, 80 L. ed. 138, 56 S. Ct. 159, 101 A.L.R. 853; Corn Products Ref. Co. v. Eddy, 249 U. S. 427, 63 L. ed. 689, 39 S. Ct. 325; Merchants Exch. v. Missouri, 248 U. S. 365, 63 L. ed. 300, 39 S. Ct. 114; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440, Ann. Cas. 1916D, 548; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Re Bear, 216 Cal. 536, 15 P. (2d) 489, 83 A.L.R. 1402; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28; Kanne v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 137 N. W. 170, 41 L.R.A.(N.S.) 1041; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; Stegmann v. Weeke, 279 Mo. 140, 214 S. W. 137, 5 A.L.R. 1060; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P 1023, 57 A.L.R. 675.

Annotation: 57 A.L.R. 686 (labels).

A law providing for the testing of gasoline for gravity, requiring it to be branded "unsafe for illuminating purposes," and requiring the word "gasoline" to be branded and the gravity stenciled on every barrel or package, is a proper police measure, and is not in contravention of the Constitution. State v. Bartles Oil Co. 132 Minn. 138, 155 N. W. 1035, L.R.A.1916D, 193.

As to labels, see Agriculture, Vol. 2, p. 438, §§ 44 et seq.; Drugs and Druggists [Also 9 R. C. L. p. 700, § 5]; Food [Also 11 R. C. L. p. 1106, §§ 12 et seq.]; Sales [Also 23 R. C. L. p. 1190, § 5].

As to weights, see Sales [Also 23 R. C. L. p. 1191, § 6]; Weights and Measures [Also 28 R. C. L. p. 2, § 1].

4 Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 S. Ct. 596; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; People v. Freeman, 242 Ill. 373, 90 N. E. 366, 17 Ann. Cas. 1098; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; State v. Danenberg, 151 N. C. 718, 66 S. E. 301, 26 L.R.A.(N.S.) 890.

See Food [Also 11 R. C. L. p. 1112, §§ 20, 21].

5 P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 78 L. ed. 505, 54 S. Ct. 277, 90 A.L.R. 1285; Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; People v. William Henning Co. 260 Ill. 554, 103 N. E. 530, 49 L.R.A.(N.S.) 1206; Chicago v. Schmidinger, 243 Ill. 167, 90 N. E. 369, 44 L.R.A.(N.S.) 632, 17 Ann. Cas. 614; People v. Dehn, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; Jay Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N. W. 383, 26 A.L.R. 24.

Annotation: 6 A.L.R. 429, s. 26 A.L.R. 28, and 90 A.L.R. 1290.

See Food [Also 11 R. C. L. p. 1116, § 22].

6 Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L.R.A.(N.S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

See Associations and Clubs, Vol. 4, p. 479, § 38.

fraud, perjury, imposition, and collusion in litigation.[7] For the same reason a statute relieving an automobile host from liability for unintentional injuries to a gratuitous guest has been held to be a valid exercise of the police power.[8]

§ 274. Promotion of General Welfare.—The general rule is well settled by many decisions dealing with widely varied specific subjects that the police power extends to the enactment of laws which promote the public welfare.[9]

7 Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A.L.R. 1189.

"Generally, gratuitous passengers are relatives or friends. Exceptionally, they are mere acquaintances, invited chance pedestrians, or those who deliberately solicit rides. . . . In many, probably most, of the cases between relatives or friends the real defendant is an insurance company. Ordinary negligence is not hard to prove if guest and host co-operate to that end. It is conceivable that such actions are not always unattended by collusion, perjury, and consequent fraud upon the court. While we may accept the contention that paid insurers are not objects of special consideration by the legislature, it is inadmissible for the court to consider a law from the viewpoint that they are not entitled to a proper trial and honest determination of liability in a lawsuit. Nor are insurance companies alone interested in the question. The results of verdicts are mirrored in insurance rates, and the law provides a possible reason in the purse of the motor-owning public, most of whom carry liability insurance. It is not inconceivable that some passengers who solicit rides may manufacture claims for liability. Groups of young folks, engaged upon a joint enterprise of social enjoyment in a borrowed car, have been known to combine to charge the owner for an accident." Ibid.

8 Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1183, 111 A.L.R. 998.

A conclusion almost contrary in theory to the rule stated in the text has been reached in another jurisdiction, resulting in a holding of invalidity, as to a statute forbidding all actions by guests, on the theory that such a statute violates a constitutional provision giving every man a remedy by due course of law for injury done him in his person or property. Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236. See generally Automobiles, Vol 5, p. 633, § 238.

9 **United States.**—West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Hicklin v. Coney, 290 U. S. 169, 78 L. ed. 247, 54 S. Ct. 142; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Missouri, K. & T. R. Co. v. Oklahoma, 271 U. S. 303, 70 L. ed. 957, 46 S. Ct. 517; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; Middleton v. Texas Power & Light Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 510, Ann. Cas. 1916D, 548; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421, Ann. Cas. 1917B, 455; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 673; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A. 1915C, 960; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 S. Ct. 200; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 S. Ct. 220; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 S. Ct. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Mantgault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 S. Ct. 379; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Passaic Bridges (Milnor v. New Jersey R. & Transp. Co.) 3 Wall. 782, 16 L. ed. 799, Fed. Cas. No. 9,620; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29.

Alabama. — Birmingham v. Hood-McPherson Realty Co. 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140.

Arkansas.—Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S. W. 887, 12 A.L.R. 1208; Central Clay Drainage Dist. v. Booser, 143 Ark. 18, 219 S. W. 336, 9 A.L.R. 1021; Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47, affirmed in 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493.

California.—Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804; Ex parte Drexel, 147 Cal. 763, 32 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878.

Colorado.—People v. Hupp, 53 Colo. 80, 123 P. 651, 41 L.R.A.(N.S.) 792, Ann. Cas. 1914A, 1177.

Connecticut.—Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57,

For this reason regulation, reasonably applied, which will promote com-

65 A.L.R. 939; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131.

Delaware. — Van Winkle v. State, 4 Boyce, 578, 91 A. 385, Ann. Cas. 1916D, 104.

Florida.—Ex parte Hawthorne, 116 Fla. 608, 156 So. 619, 96 A.L.R. 572.

Georgia.—Morris v. Columbus, 102 Ga. 792, 30 S. E. 850, 42 L.R.A. 175, 66 Am. St. Rep. 243.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; Sifers v. Johnson, 7 Idaho, 798, 65 P. 709, 54 L.R.A. 785, 97 Am. St. Rep. 271.

Illinois.—People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A. (N.S.) 998; Massie v. Cessna, 239 Ill. 352, 88 N. E. 152, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234; Chicago v. Bowman Dairy Co. 234 Ill. 294, 84 N. E. 913, 17 L.R.A.(N.S.) 684, 123 Am. St. Rep. 100, 14 Ann. Cas. 700; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30.

Indiana.—Chicago, T. H. & S. E. R. Co. v. Anderson, 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182, affirmed in 242 U. S. 283, 61 L. ed. 302, 37 S. Ct. 124; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 65; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136.

Iowa.—State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137.

Kansas.—Winkler v. Anderson, 104 Kan. 1, 177 P. 521, 3 A.L.R. 268; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

Kentucky.—Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Silva v. Newport, 150 Ky. 781, 150 S. W. 1024, 42 L.R.A.(N.S.) 1060, Ann. Cas. 1914D, 613.

Louisiana.—Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L.R.A.1915B, 859, Ann. Cas. 1916C, 1274.

Maryland.—Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Cochran v. Preston, 108 Md. 220, 70 A. 113, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551.

Massachusetts.—Ahmed's Case, 278 Mass. 180, 179 N. E. 684, 79 A.L.R. 669; Smith v. New England Aircraft Co. 270 Mass. 511, 170 N. E. 385, 69 A.L.R. 300; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A. (N.S.) 879, Ann. Cas. 1915B, 659; Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 474, 86 N. E. 925, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439; Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842, writ of error dismissed in 207 U. S. 599, 52 L. ed. 358, 28 S. Ct. 253; John P. Squire & Co. v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322.

Michigan. — Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561.

Minnesota.—State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A. 1917F, 1050; Kanne v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 137 N. W. 170, 41 L.R.A.(N.S.) 1041; State ex rel. Beck v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681, writ of error dismissed in (U. S.) 46 L. ed. 1263, 22 S. Ct. 931.

Mississippi.—L. N. Dantzler Lumber Co. v. Texas & P. R. Co. 119 Miss. 328, 80 So. 770, 4 A.L.R. 1669; Bank of Oxford v. Love, 111 Miss. 699, 72 So. 133, 8 A.L.R. 894, affirmed in 250 U. S. 603, 63 L. ed. 1165, 40 S. Ct. 22; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A. (N.S.) 851; Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375.

Montana.—Colvill v. Fox, 51 Mont. 72, 149 P. 496, L.R.A.1915F, 894.

Nebraska.—Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513.

Nevada.—State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

New Hampshire.—State v. Prince, 77 N. H. 581, 94 A. 966, L.R.A.1916A, 950.

New York.—People ex rel. Tyroler v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763.

North Carolina.—Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453, 7 L.R.A. (N.S.) 321.

Ohio.—Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N. E. 512, Ann. Cas. 1915B, 106; State v. Boone, 84 Ohio St. 346, 85 Ohio St. 313, 95 N. E. 924, 97 N. E. 975, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L.R.A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898.

Oklahoma.—Collins-Dietz-Morris Co. v. State Corp. Commission, 154 Okla. 121, 7 P. (2d) 123, 80 A.L.R. 561; Barbour v. Walker, 126 Okla. 227, 259 P. 552, 56 A.L.R. 1049; Ohio Drilling Co. v. State Industrial Commission, 86 Okla. 139, 207 P. 314, 25 A.L.R. 367; Walcher v. First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593.

Oregon.—State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043.

South Dakota.—Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A. 1915A, 632, Ann. Cas. 1917A, 760.

Tennessee.—Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

Texas.—Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108.

Washington.—State v. Van Vlack, 101 Wash. 503, 172 P. 563, L.R.A.1918E, 108; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

West Virginia.—Mill Creek Coal & Coke Co. v. Public Serv. Commission, 84 W. Va. 662, 100 S. E. 557, 7 A.L.R. 1081; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

Wisconsin.—State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

Wyoming.—Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A.(N.S.) 898, Ann. Cas. 1912C, 819.

[10] State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

[11] State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; McFadden v. Blocker, 2 Ind. Terr. 260, 48 S. W. 1043, 58 L.R.A. 878, later appeal in 3 Ind. Terr. 224, 54 S. W. 873, 58 L.R.A. 894, reversed on another point in (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, which is affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Sanders v. Com. 117 Ky. 1, 77 S. W. 358, 1 L.R.A.(N.S.) 932, 111 Am. St. Rep. 219.

The owner of a clock is not deprived of his property without due process of law by a statute forbidding the display of it in a public place to furnish time for the general public when it is set to indicate other than standard time. State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131. Annotation: 37 A.L.R. 134 (criticizing the Bassett Case, supra, on the ground that it goes too far in stretching the relationship between the general welfare and the purpose of such a statute).

As to discretion of legislature generally, see infra, § 305.

[12] See supra, § 267.

[13] Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A.(N.S.) 1147, 125 Am. St. Rep. 818.

[14] Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A. (N.S.) 707; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; State v. Boone, 84 Ohio St. 346, 85 Ohio St. 313, 95 N. E. 924, 97 N. E. 975, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

As to the necessity of law to apply to the public generally rather than to a class in order to be constitutional, see supra, § 263.

[15] State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28.

In considering general welfare as the basis of the police power, the court will regard current conditions. State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

[16] Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[17] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892.

For the rule that all rights are subordinate to the exercise of the police power to forbid things inimical to public policy, see supra, § 267.

[1] State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810.

munity development finds support in the police power.[10] The power of the legislature in this respect and its discretion in the employment of means to achieve promotion of the general welfare are very great.[11] It may enact laws to preserve and promote the public welfare, even at the expense of private rights.[12] Such an exercise of the police power, however, must have in view the good of the citizens of the sovereignty as a whole,[13] as distinguished from the interests of a particular class.[14]

In connection with the exercise of the police power, the public welfare embraces a variety of interests calling for public care and control. These are the primary social interests of safety, order, and morals, economic interests, and nonmaterial and political interests.[15] In this field the legislature may prohibit all things hurtful to the welfare of society[16] or detrimental to the public interests.[17] On the other hand, a legislature cannot, under pretense of exercising the police power, enact a statute which does not actually concern the welfare of society. When there is no fair, just, and reasonable connection between the law and the common good, and it is manifest that such was not the object of the statute, it will not be sustained.[1] The mere restriction of

liberty or of property rights cannot, of itself, be denominated public welfare and treated as a legitimate object of the police power.[2]

An important class of statutes more and more often sustained as tending to promote the public welfare includes those which relate to the physical welfare of the members of the body politic. It has been said that it is to the interest of the state to have strong, robust, healthy citizens to preserve the strength and vigor of the race and to be capable of self-support, of bearing arms, and of adding to the resources of the country.[3] Various labor laws tending to produce such results have been upheld as a valid exercise of the police power.[4]

§ 275. —Protection from Incapacity.—The power of the state to provide for the general welfare authorizes it to establish such regulations as will secure or tend to secure the people against the consequences of ignorance and incapacity. To that end it may exact a certain degree of skill and learning in professions and pursuits which concern the public health and welfare and are of such a character that a special course of study, training, or experience is needed to qualify one to pursue such callings.[5] The possession of such qualifications is generally ascertained upon an examination of parties by competent persons or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal.[6] The nature and extent of the qualifications required must depend primarily

2 Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960.

3 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah, 96, 46 P. 1105, 37 L.R.A. 108; Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 A.L.R. 284; Inland Steel Co. v. Yednak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, 52 Am. St. Rep. 707.

4 For discussion of all questions relating to the constitutionality of laws regulating or prohibiting child labor, of laws limiting hours of labor in private employment in varied occupations for men, women, and children, or of laws relating to minimum wages in private employment for men, women, and children, see LABOR [Also 16 R. C. L. p. 477, § 54; p. 482, §§ 57 et seq.; p. 497, §§ 68 et seq.].

As to the constitutionality of statutes fixing the time for the payment of wages, of statutes allowing employees time off without loss of pay to vote, or of statutes fixing the rate of wages of persons employed in public work, see MASTER AND SERVANT.

As to the validity of statutes giving a lien or preferring claims of employees for wages in case of insolvency of employer, see INSOLVENCY.

5 Semler v. Oregon State Dental Examiners, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570; Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; Klafter v. State Examiners, 259 Ill. 15, 103 N. E. 193, 46 L.R.A. (N.S.) 532, Ann. Cas. 1914B, 1221; State ex rel. Burroughs v. Webster, 150 Ind. 697, 50 N. E. 750, 41 L.R.A. 212; State v. Bair, 112 Iowa, 466, 84 N. W. 532, 51 L.R.A. 776; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811; Louisiana State Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed in 274 U. S. 720, 71 L. ed. 1324, 47 S. Ct. 590; State v. De Verges, 153 La. 349, 95 So. 805, 27 A.L.R. 1526; Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; People v. Lewis, 233 Mich. 240, 206 N. W. 553, 42 A.L.R. 1337; State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L.R.A. 119; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D. 392; Roman v. Lobe, 243 N. Y. 51, 152 N. E. 461, 50 A.L.R. 1329; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A. 1915D, 538; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785 (plumbing); State v. Randolph, 23 Or. 74, 31 P. 201, 17 L.R.A. 470, 37 Am. St. Rep. 655.

The general power of the state to exact proper skill and learning of those who follow pursuits involving the public health, safety, and welfare and to prescribe appropriate tests therefor cannot at this day be questioned. It has been exercised from time immemorial and has been sustained by repeated decisions of the courts. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538.

6 Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; State ex rel. Powell v. State Medical Examining Bd. 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L.R.A. 791, 87 Am. St. Rep. 605; State ex rel. Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L.R.A. 252.

upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation.[7] The right to regulate such professions and occupations extends to those engaged therein as well as to those seeking for the first time admission to their ranks, for it is generally recognized that no matter how long a person has been in the practice of a profession, he does not have any vested right to continue therein.[8]

Among the professions or specialized callings in which the state prescribes the requirements of training and capacity which an aspirant must attain before even being permitted to practice or engage in business are the practice of law,[9] medicine and surgery,[10] chiropractic,[11] dentistry,[12] nursing,[13] accountancy,[14] pharmacy,[15] architecture,[16] civil engineering,[17] and even plumbing[18] and barbering.[19] The exercise of the police power in this respect, however, is not wholly limited to the learned professions and to those occupations which require special training and experience. It also extends to business pursuits which involve none of these characteristics and yet affect the public

7 Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L.R.A. 190; State v. Knowles, 90 Md. 646, 45 A. 877, 49 L.R.A. 595.

8 Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State v. Heffernan, 40 R. I. 121, 100 A. 55, citing R. C. L.

No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power. State v. Hovorka, 100 Minn. 249, 110 N. W. 870, 8 L.R.A.(N.S.) 1272, 10 Ann. Cas. 398.

9 Re Maddox, 93 Md. 727, 50 A. 487, 55 L.R.A. 298; Re Taylor, 48 Md. 28, 30 Am. Rep. 451.

See ATTORNEYS AT LAW, Vol. 5, p. 273, § 19.

10 Lambert v. Yellowley, 272 U. S. 581, 71 L. ed. 422, 47 S. Ct. 210, 49 A.L.R. 575; Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; State ex rel. La Prade v. Smith, 43 Ariz. 131, 343, 29 P. (2d) 718, 31 P. (2d) 102, 92 A.L.R. 168; People by Kerner v. United Medical Service, 362 Ill. 442, 200 N. E. 157, 103 A.L.R. 1229; People v. Witte, 315 Ill. 282, 146 N. E. 178, 37 A.L.R. 672; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.

The state's police power extends to requiring that drugless practitioners employing faith, hope, and the processes of mental suggestion and mental adaptation in the treatment of disease shall have completed a prescribed course of study and passed an examination. Crane v. Johnson, 242 U. S. 339, 61 L. ed. 348, 37 S. Ct. 176, Ann. Cas. 1917B, 796.

See PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 352, §§ 3 et seq.].

11 Louisiana State Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed in 274 U. S. 720, 71 L. ed. 1324, 47 S. Ct. 590; People v. Lewis, 233 Mich. 240, 206 N. W. 553, 42 A.L.R. 1337.

12 Semler v. Oregon State Dental Examiners, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570.

13 State ex rel. Marshall v. District Ct. 50 Mont. 289, 146 P. 743, Ann. Cas. 1917C, 164.

Annotation: Ann. Cas. 1917C, 168.

14 State v. De Verges, 153 La. 349, 95 So. 805, 27 A.L.R. 1526.

See CERTIFIED PUBLIC ACCOUNTANTS, Vol. 10, p. 517, § 2.

15 State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719.

See DRUGS AND DRUGGISTS [Also 9 R. C. L. p. 697, § 3].

16 Klafter v. State Bd. of Examiners, 259 Ill. 15, 102 N. E. 193, 46 L.R.A.(N.S.) 532, Ann. Cas. 1914B, 1221.

See ARCHITECTS, Vol. 3, p. 998, § 3.

17 Annotation: 55 A.L.R. 308.

Land surveyors cannot be required to obtain a certificate of qualification. Doe v. Jones, 327 Ill. 387, 158 N. E. 703, 55 A.L.R. 303. Annotation: 55 A.L.R. 307.

18 Douglas v. People, 225 Ill. 536, 80 N. E. 341, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; People v. City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L.R.A. 718 (decided by a divided court); State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785.

Annotation: 5 L.R.A.(N.S.) 674; 8 L.R.A. (N.S.) 1116; 27 L.R.A.(N.S.) 283; 50 L.R.A. (N.S.) 421.

19 See BARBERS AND BEAUTY SPECIALISTS, Vol. 7, p. 616, § 7.

health, safety, or comfort, such as dealing in milk,[20] locomotive engineering,[1] stationary engineering,[2] and many others falling within the principle stated.[3]

The general principle rests, as already stated, on the promotion of the general welfare and does not permit any unreasonable interference with the right to labor.[4]

§ 276. —Conservation of Natural Resources.—The state, in the exercise of its power to enact laws for the general welfare of its people, may enact laws designed to increase the industries of the state, to develop its resources, and to add to its wealth.[5] The majority of the authorities, moreover, support the rule that not only adjoining landowners, but the public at large, have an interest in the preservation of the natural resources of the country sufficient to justify appropriate legislation to prevent exploitation or waste of such resources by the owners of the land on which they are found.[6] This rule finds

[20] People v. Health Dept. 189 N. Y. 187, 82 N. E. 187, 13 L.R.A.(N.S.) 894.
See Food [Also 11 R. C. L. p. 1102, § 8; p. 1109, §§ 17 et seq.].

[1] Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28, sustaining the validity of a statute requiring all locomotive engineers to submit to an examination for color blindness and then providing that those unable to distinguish signals should not act as engineers on railroad trains.
Annotation: 58 A.L.R. 570.

[2] People v. Fournier, 175 Mich. 364, 141 N. W. 689, Ann. Cas. 1915 A. 1015; Hyvonen v. Hector Iron Co. 103 Minn. 331, 115 N. W. 167, 123 Am. St. Rep. 332.
Annotation: Ann. Cas. 1915A, 1017.

[3] See generally Licenses [Also 17 R. C. L. p. 547, § 62].

[4] Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420.
Annotation: 58 A.L.R. 571.
This text qualification applies in invalidating acts seeking to qualify and license horseshoers. Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L.R.A. 558; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927. Annotation: 1 Ann. Cas. 930.
"**The art of paper hanging** is one that requires manual dexterity, skill, and some experience. It differs in that respect not at all from other similar occupations, such as house painting, carpentry, stonecutting, bricklaying, horseshoeing, repairing machinery, wood carving, plastering, and the like, which men have from time immemorial followed without regulation or interference as a matter of common right and which have no substantial relation to the public health or safety." Dasch v. Jackson, 170 Md. 251, 183 A. 534, citing R. C. L.
A statute permitting unlicensed electricians to be employed by the lighting and electric railway companies and the department of police and public buildings of New Orleans, for the installation and maintenance of their "equipment pole line services" and "meters," which work is important, and requiring electricians employed by others for other than work of minor importance to be licensed, contravenes the constitutional requirement that all persons be protected in their right of property, including the right to earn a livelihood. State v. Gantz, 124 La. 535, 50 So. 524, 24 L.R.A.(N.S.) 1072.

[5] Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 S. Ct. 600; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 S. Ct. 559; State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Territory v. Hoy Chong, 21 Haw. 39, Ann. Cas. 1915A, 1155; State v. McCullagh, 96 Kan. 786, 153 P. 557, 11 A.L.R. 980; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918F, 542; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Graves v. Dunlap, 87 Wash. 648, 152 P. 532, L.R.A. 1916C, 338, Ann. Cas. 1917B, 944; State v. Sherman, 18 Wyo. 169, 105 P. 299, 27 L.R.A. (N.S.) 898, Ann. Cas. 1912C, 819.
Enhancement of land values is within the police power. Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804.
Legislation providing for the licensing and regulation of a fur farm for the purpose of breeding, propagating, trapping, and dealing in such animals and giving the licensee the exclusive right, for and during the term of the license, to breed and propagate such animals thereon and to the exclusive and sole ownership of any property in all such animals caught or taken therefrom is valid as an exercise of the state's police power in carrying out its large and comprehensive conservation program of promoting and protecting the public resources and the comfort and happiness of its people. Krenz v. Nichols, 197 Wis. 394, 222 N. W. 300, 62 A.L.R. 466. Annotation: 62 A.L.R. 473.
As to conservancy districts, see supra, § 271.
See also Fish and Fisheries [Also 11 R. C. L. p. 1041, §§ 28 et seq.]; Game and Game Laws [Also 12 R. C. L. p. 691, §§ 9 et seq.].

[6] Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576, affirming 150 Ind. 698, 50 N. E. 1125, which reaffirmed on second appeal, on the authority of the opinion on the former appeal, 150 Ind. 21, 49 N. E. 809, 47 L.R.A. 627; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Com. v. Trent, 117 Ky. 34, 77 S. W. 390, 4 Ann. Cas. 209; Opinion of Justices, 103 Me. 506, 69 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; Eccles v. Ditto, 23 N. M. 235, 167 P. 726, L.R.A.1918B, 126; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989.
See also Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; State v. Thrift Oil & Gas Co. 162 La. 165, 110 So. 188, 51 A.L.R. 261; Hague v. Wheeler, 157 Pa. 324, 27 A. 714, 22 L.R.A. 141, 37 Am. St. Rep. 736.
Annotation: 24 A.L.R. 307, s. 78 A.L.R. 835.
More specifically, statutes limiting or controlling the exploitation or waste of natural resources have been upheld as against various constitutional objections: they do not transcend the police power of the states; they do not constitute a taking of property without due process of law; they do not deny the equal protection of the laws; they are not contrary to constitutional provisions forbidding the granting of special privileges and immunities, or class legislation; they do not take property without just compensation; they do not impair existing contract obligations; they do not violate a constitutional provision forbidding the passing of local or special laws or a provision that all laws of a general nature shall have uniform operation. Annotation: 24 A.L.R. 308, 310, s. 78 A.L.R. 835, 836.
The constitutional guaranties of life, liberty, and the pursuit of happiness are not infringed by statutes prohibiting the wasting of natural resources. Annotation: 24 A.L.R. 310, s. 78 A.L.R. 835.
The constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent on any nice estimate of the extent of present use or speculation as to future needs. Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 S. Ct. 529, 14 Ann. Cas. 560; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.
It is sometimes provided in the very terms of a state Constitution that the natural resources of the state shall be protected, conserved, and replenished, and that the legislature shall enact all laws necessary to protect, conserve, and replenish the natural resources of the state and to prohibit and prevent waste or any wasteful use thereof. State v. Thrift Oil & Gas Co. 162 La. 165, 110 So. 188, 51 A.L.R. 261.

[7] Henderson Co. v. Thompson, 300 U. S. 258, 81 L. ed. 632, 57 S. Ct. 447; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576, affirming 150 Ind. 21, 49 N. E. 809, 47 L.R.A. 627; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Brown v. Humble Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393. See also Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29.
Annotation: 24 A.L.R. 310, s. 78 A.L.R. 836; 67 A.L.R. 1348, s. 99 A.L.R. 1125; 23 L.R.A.(N.S.) 436, s. L.R.A.1918B, 134.
See Gas and Oil [Also 12 R. C. L. p. 867, § 5].

[8] Thompson v. Consolidated Gas Utilities Corp. 300 U. S. 55, 81 L. ed. 510, 57 S. Ct. 364; Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190; Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. Ct. 559, 86 A.L.R. 403; Bandini Petroleum Co. v. Superior Ct. 284 U. S. 8, 76 L. ed. 136, 52 S. Ct. 103, 78 A.L.R. 826; Walls v. Midland Carbon Co. 254 U. S. 300, 65 L. ed. 276, 41 S. Ct. 118; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576, affirming 150 Ind. 21, 49 N. E. 809, 47 L.R.A. 627; Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L.R.A. 294, 62 Am. St. Rep. 477; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Brown v. Humble Oil & Ref. Co. 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069, 99 A.L.R. 1107, 101 A.L.R. 1393.
Annotation: 24 A.L.R. 310, s. 78 A.L.R. 836; 67 A.L.R. 1348, s. 99 A.L.R. 1125; 86 A.L.R. 418; 23 L.R.A.(N.S.) 436, s. L.R.A. 1918B, 134.
See Gas and Oil [Also Mines, 18 R. C. L. p. 1208, § 112].

[9] Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; Eccles v. Ditto, 23 N. M. 235, 167 P. 726, L.R.A.1918B, 126; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.
See also Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L.R.A. 589, 98 Am. St. Rep. 933, holding that the police power does not justify legislation prohibiting the waste of water from artesian wells to the injury of the wells of neighboring proprietors, and stating that although the general rule applies to gas and oil, it is inapplicable to percolating waters.
Annotation: 24 A.L.R. 312, s. 78 A.L.R. 842, 23 L.R.A.(N.S.) 436, s. L.R.A.1918B, 134.
See also Waters [Also 27 R. C. L. p. 1179, § 96].

[10] Opinion of Justices, 103 Me. 506, 60 A. 627, 19 L.R.A.(N.S.) 422, 13 Ann. Cas. 745; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.
Annotation: 24 A.L.R. 316, s. 78 A.L.R. 842; 19 L.R.A.(N.S.) 422.
See Logs and Timber [Also 17 R. C. L. p. 1167, § 80].

[11] Annotation: 24 A.L.R. 317, s. 78 A.L.R. 843.
See Waters [Also 27 R. C. L. p. 1366, § 274].

the public, as distinguished from an injury to an individual.[12] There is, however, a minority view which takes the position that where underlying minerals are a part of the realty and the rule of property in the jurisdiction is that the owner of the surface is the absolute owner in fee of everything permanently situated beneath the surface, a state statute enacted for the purpose of preventing the wasting thereof by the owner, to the detriment of the public at large, is unconstitutional.[13]

The so-called "seed grain statutes" and laws permitting the making of loans out of public moneys to needy farmers seem to constitute another illustration of legislation under the police power in furtherance of the general welfare.[14]

It should be noticed that since a state cannot burden interstate commerce under the guise of the police power,[15] it cannot forbid the exportation of any of its natural resources, even though the purpose is to preserve such resources, by providing that only domestic corporations may transport or control such resources, which would result in such corporations gaining absolute property rights. Such regulations are a burden upon the sale of a commercial commodity in interstate commerce.[16]

§ 277. Regulations in Behalf of Public Peace, Good Order, and Comfort.—The police power comprehends laws necessary to secure the peace, good order, dignity, and comfort of society.[17] Included in this object of the power is a large group of offenses and acts amounting to questionable conduct which, if permitted to be committed untrammeled, would seriously disrupt the public peace.[18] Thus, the state has the power to regulate reasonably the right to bear arms, thereby forbidding the carrying of concealed deadly weapons.[19] It may regulate or suppress the art or practice of communicating with departed spirits by a person known as a "medium."[20] It may forbid an individual to go onto the premises of another during the night, without having secured permission from the proprietor or landlord, in order to assist a tenant in moving from the premises.[1] Other instances of this exercise of the police power may be cited, such as statutes forbidding improper uses of the flag of the United States[2] and those forbidding drumming or the soliciting of business or patron-

[12] Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.

[13] Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294, wherein the court, in reaching its conclusion, expressly pointed out the distinction between cases arising in jurisdictions where the underlying minerals are common property until reduced to possession and those arising in jurisdictions like Montana where that rule of property does not obtain.

See also Huber v. Merkel, 117 Wis. 355, 94 N. W. 354, 62 L.R.A. 589, 98 Am. St. Rep. 933.

Annotation: 24 A.L.R. p. 310.

[14] State v. Nelson County, 1 N. D. 88, 45 N. W. 33, 8 L.R.A. 283, 26 Am. St. Rep. 609.

Annotation: 92 A.L.R. 769, 773.

See AGRICULTURE, Vol. 2, p. 422, § 28.

[15] See supra, § 265.

[16] West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 31 S. Ct. 564, 35 L.R.A. (N.S.) 1193.

Annotation: 35 L.R.A.(N.S.) 1193.

[17] State v. Sinchuk, 96 Conn. 695, 115 A. 33, 20 A.L.R. 1515; Com. v. Karvonen, 219 Mass. 30, 106 N. E. 556, L.R.A.1915B, 706, Ann. Cas. 1916D, 846; State v. Moilen, 140 Minn. 112, 167 N. W. 345, 1 A.L.R. 331; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100.

[18] See cases cited infra, notes 19–3, this section.

As to the power of the state over crimes, see CRIMINAL LAW, and specific criminal titles.

As to the right to legislate against subversive literature, seditious utterances, carrying of red flags, etc., see SEDITION, SABOTAGE, etc.

[19] See infra, § 313.

[20] McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292.

[1] State v. Hunter, 164 La. 405, 114 So. 76, 55 A.L.R. 309, affirmed in 275 U. S. 508, 72 L. ed. 398, 48 S. Ct. 158.

Annotation: 55 A.L.R. 311.

[2] Halter v. State, 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525 (advertising purposes held improper).

Contra.—Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30 (advertising purposes held not improper).

Annotation: 7 L.R.A.(N.S.) 1079.

age for any hotel, boardinghouse, bathhouse, or for any medical practitioner, on the trains or at the depots of any common carrier.[3]

E. Nature of Regulations

1. Exercise of Power

§ 278. Through Corporation or Public Agency.—Wherever a legislature has the right to accomplish a certain result and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose.[4] Thus, a state may use a private corporation and confer upon it necessary powers to carry into effect sanitary regulations.[5] It may also create a governmental agency for the enforcement of its police powers.[6] The creation, however, of a private or quasi-public corporation which is not a public corporation in the sense that it is established as an instrumentality of government, to which all owners of motor vehicles, with certain exceptions, before using them upon a highway, must pay tribute for the creation of an insurance fund, cannot be justified as an exercise of the police power.[7]

2. Regulation

§ 279. As to Real Property.—In accordance with the general rule that all property rights are held subject to reasonable police regulations so that the rights of the general public may be protected,[8] the owner of real estate may be restricted in the use and management of it in such a way as best to conserve the public health and safety. Nevertheless, the owner has the right to erect such structures or to use the property for such legitimate purposes as he may see fit, utilizing such portions of it as he pleases, as long as in so doing he in no manner injuriously affects the public health, safety, morals, and general welfare.[9] Any law abridging rights to a use of property, which use does not infringe the rights of others, or limiting the use of property beyond

[3] Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, affirming 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47.

As to prohibition of house-to-house canvassing and selling, see infra, §§ 291, 292.

[4] Louisville Gas Co. v. Citizens Gaslight Co. 115 U. S. 683, 29 L. ed. 510, 6 S. Ct. 265; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Henderson v. Heyward, 109 Ga. 373, 34 S. E. 590, 47 L.R.A. 366, 77 Am. St. Rep. 384; Overshiner v. State, 156 Ind. 187, 59 N. E. 463, 51 L.R.A. 748, 83 Am. St. Rep. 187; Scholle v. State, 90 Md. 729, 46 A. 326, 50 L.R.A. 411; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603.

[5] Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 S. Ct. 390; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Western U. Teleg. Co. v. New York (C. C.) 38 F. 552, 3 L.R.A. 449; Overshiner v. State, 156 Ind. 187, 59 N. E. 463, 51 L.R.A. 748, 83 Am. St. Rep. 187.

[6] Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L.R.A. 190, 94 Am. St. Rep. 727.

[7] Opinion of Justices, 271 Mass. 582, 171 N. E. 294, 69 A.L.R. 388.

Annotation: 69 A.L.R. 398.

See AUTOMOBILES, Vol. 5, p. 797, § 520.

[8] See supra, § 268.

[9] Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; Curran Bill Posting & Distributing Co. v. Denver, 47 Colo. 221, 107 P. 261, 27 L.R.A.(N.S.) 544; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Rehmann v. Des Moines, 200 Iowa, 286, 204 N. W. 267, 40 A.L.R. 922; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Com. v. Boston Adv. Co. 188 Mass. 348, 74 N. E. 601, 69 L.R.A. 817, 108 Am. St. Rep. 494; State v. Whitlock, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765; Bryan v. Chester, 212 Pa. 259, 61 A. 894, 108 Am. St. Rep. 870; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

The owner of property within a city or town may erect any structure or building thereon or use the same for any lawful purpose that he may see fit, subject only to such restrictions and regulations as the municipal corporation may, in the exercise of its police power, by proper enactment, reasonably impose. Rehmann v. Des Moines, 200 Iowa, 286, 204 N. W. 267, 40 A.L.R. 922.

For similar rules as to use of property generally, see supra, §§ 268, 269.

what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power.[10]

As in other applications of the police power, the difficulty concerning regulations relating to real property is in attempting to draw the line between constitutional regulation and unconstitutional invasion.[11] The tendency is to uphold such legislation as valid regulation, for, under the modern view, the police power extends to attracting a desirable citizenship to a particular locality of a municipality and assuring its permanency, to fostering pride in, and attachment to, the city, to promoting happiness and contentment, to stabilizing the use and value of property, and to promoting the public tranquillity and good order of the city.[12] Present-day conceptions of the extent of the public interest, particularly in relation to the public welfare, are very broad; hence, many restrictions on the uses to which real property may be put, many limitations on the type of structures which may be erected on premises in certain localities, and many groupings in definite localities of the enterprises which may be carried on on real property are now sustained as valid exercises of the police power which a few years ago in most jurisdictions were regarded as invalidly invading the constitutional rights of the property owner. Such regulation, now generally upheld, is the zoning system of the modern American municipality.[13]

The requirements as to the buildings which are permitted to be erected on private real estate are more or less rigidly supervised by the public authorities for the protection of the general public,[14] although to come within the police power, building regulations must be reasonable and for the protection of property, the public morals, or the welfare of the inhabitants of the community.[15] As a general rule, statutes providing sanitary measures, fire protection, and inspection for buildings are not unconstitutional as depriving the owners thereof of property or liberty without due process of law.[16] A statute which makes it unlawful to build structures on one's own land, which are primarily or solely intended to injure or annoy an adjoining owner and which serve no really useful and reasonable purpose, is not unconstitutional although, if it prohibited the erection of useful and valuable structures, it would deprive the owner of property without due process of law and compensation.[17]

§ 280. —Æsthetic Considerations.—It has always been a well-settled rule, accepted even by courts which have partially questioned its soundness in relation to modern social conditions, that the state cannot limit or restrict the

[10] Curran Bill Posting & Distributing Co. v. Denver, 47 Colo. 221, 107 P. 261, 27 L.R.A. (N.S.) 544; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279; State ex rel. Westminster Presby. Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A.L.R. 437; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L.R.A.(N.S.) 735; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

The police power will not justify a rule of park commissioners forbidding the maintenance of business signs so near the parkway as to be plainly visible to persons therein. Com. v. Boston Adv. Co. 188 Mass. 348, 74 N. E. 601, 69 L.R.A. 817, 108 Am. St. Rep. 494.

[11] See supra, § 259.

[12] State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

[13] See the leading case, Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016.

See ZONING.

[14] See BUILDINGS, Vol. 9, p. 199, §§ 3 et seq.

[15] State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Rehmann v. Des Moines, 200 Iowa, 286, 204 N. W. 267, 40 A.L.R. 922; Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 34 A.L.R. 32.

[16] State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909.

See BUILDINGS, Vol. 9, p. 209, § 14; p. 213, §§ 17 et seq.

[17] Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A. 345.

use which a person may make of his property under the guise of the police power where the exercise of such power would be warranted solely on æsthetic considerations.[18] Some of the authorities have indicated, however, that the law on this subject is undergoing development, and perhaps cannot be said to be conclusively settled as to the extent of the police power.[19] Other authorities, while not openly repudiating the general rule, have partially circumvented its absolute application by strong intimations that æsthetic considerations have a definite relation to the public welfare.[20] It has been said that maintaining the beauty of a fashionable residential neighborhood in a city is a matter of general welfare within the police power of the state[1] and that an

[18] Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567, affirming 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523; Varney & Green v. Williams, 155 Cal. 318, 100 P. 867, 21 L.R.A.(N.S.) 741, 132 Am. St. Rep. 88; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; Curran Bill Posting & Distributing Co. v. Denver, 47 Colo. 221, 107 P. 261, 27 L.R.A. (N.S.) 544; Farist Steel Co. v. Bridgeport, 60 Conn. 278, 22 A. 561, 13 L.R.A. 590; Anderson v. Shackleford, 74 Fla. 36, 76 So. 343, L.R.A.1918A, 139; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A. (N.S.) 438, Ann. Cas. 1915A, 292; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A. (N.S.) 998; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892; General Outdoor Adv. Co. v. Indianapolis Dept. Pub. Parks, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; Com. v. Boston Adv. Co. 188 Mass. 348, 74 N. E. 601, 69 L.R.A. 817, 108 Am. St. Rep. 494; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; Quintini v. Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62; St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998, 41 L.R.A.(N.S.) 177; Passaic v. Paterson Bill Posting Adv. & Sign Painting Co. 72 N. J. L. 285, 62 A. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995; State v. Whitlock, 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670, 16 Ann. Cas. 765; Youngstown v. Kahn Bros. Bldg. Co. 112 Ohio St. 654, 148 N. E. 842, 43 A.L.R. 662; Bryan v. Chester, 212 Pa. 259, 61 A. 894, 108 Am. St. Rep. 870; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387; State ex rel. Sale v. Stahlman, 81 W. Va. 335, 94 S. E. 497, L.R.A.1918C, 77; Fruth v. Board of Affairs, 75 W. Va. 456, 84 S. E. 105, L.R.A. 1915C, 981. See also Standard Oil Co. v. Bowling Green, 244 Ky. 362, 50 S. W. (2d) 960, 86 A.L.R. 648.

Annotation: 72 A.L.R. 477; 34 L.R.A. (N.S.) 998, s. L.R.A.1917A, 1220; 128 Am. St. Rep. 673; 16 Ann. Cas. 767; Ann. Cas. 1915A, 294; Ann. Cas. 1916C, 493.

"It is commendable and desirable, but not essential to the public need, that our æsthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for æsthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an æsthetic standpoint, and this fact makes the æsthetic standard entirely impractical as a standpoint for use restriction upon property. The world would be at continual seesaw if æsthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely æsthetic interest, must be in danger in order to justify its use." Youngstown v. Kahn Bros. Bldg. Co. 112 Ohio St. 654, 148 N. E. 842, 43 A.L.R. 662.

"Æsthetic considerations are, fortunately, not wholly without weight in a practical world. Perhaps such considerations need not be disregarded in the formulation of regulations to promote the public welfare. . . . 'Public welfare' is a concept which in recent years has been widened to include many matters which in other times were regarded as outside the limits of governmental concern. As yet, at least, no judicial definition has been formulated which is wide enough to include purely æsthetic considerations." Dowsey v. Kensington, 257 N. Y. 221, 177 N. E. 427, 86 A.L.R. 642.

See also, the note in 10 Va. L. Rev. 224, and the article by Newman F. Baker, "Æsthetic Zoning Regulations," 25 Mich. L. Rev. 124.

For a discussion of regulations relating to billboards, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 834, § 140].

[19] Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516.

[20] General Outdoor Adv. Co. v. Indianapolis Dept. Pub. Parks, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453; State ex rel. Civello v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260.

[1] State ex rel. Civello v. New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260.

"If by the term 'æsthetic considerations is meant a regard merely for outward appearances, for good taste in the matter of the beauty of the neighborhood itself, we do not observe any substantial reason for saying that such consideration is not a matter of general welfare. The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general

æsthetic and cultural side of municipal development, for the prevention of a thing which offends the sense of sight, may, within reasonable limitations, be fostered under the police power.[2] All of the authorities which have passed on the question have agreed that even though æsthetic considerations alone may not warrant police regulation, they may be taken into account where other elements are present to justify regulation, and that the fact that such considerations enter into the reasons for the passage of an act will not invalidate it where other elements within the scope of the police power are present.[3]

§ 281. As to Dealings with Personal Property or Intangibles.—The police power of the state may be lawfully invoked in many ways and in divers transactions to regulate dealings in all sorts of personal property and intangibles. Such regulation usually partakes of the nature of restrictions upon sales of different articles to protect the public health, safety, and morals, to prevent fraud, and to promote the general welfare.[4] Hence, constitutional provisions are not violated by prohibiting one from misrepresenting what he has to sell in order to impose upon purchasers, even if the subject of the sale is an article equally as good as the one which it is represented to be, the prohibition being directed against deception of the public to accomplish sales.[5] In order to safeguard the public health and to protect the public from fraud, many regulations are imposed upon the sale of foodstuffs, which relate to the quality of merchandise proffered for consumption, the purity and ingredients thereof and a statement of what foreign substances, if any, are therein contained, the quantities which are offered, and the refrigeration or preservation processes which have been used.[6]

way the value of property in the neighborhood. It is, therefore, as much a matter of general welfare as is any other condition that fosters comfort or happiness, and consequent values generally of the property in the neighborhood. Why should not the police power avail as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise or odor, or a menace to safety or health. The difference is not in principle, but only in degree." Ibid.

[2] General Outdoor Adv. Co. v. Indianapolis Dept. Pub. Parks, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453.

[3] Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567, 16 Ann. Cas. 1222, affirming 193 Mass. 364, 79 N. E. 745, 23 L.R.A. (N.S.) 1160, 118 Am. St. Rep. 523; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; General Outdoor Adv. Co. v. Indianapolis Dept. of Pub. Parks, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453; Cochran v. Preston, 108 Md. 220, 70 A. 113, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950. See also Dowsey v. Kensington, 257 N. Y. 221, 177 N. E. 427, 86 A.L.R. 642.

Annotation: 72 A.L.R. 480, 481.

[4] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 S. Ct. 606; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 165; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452; Boise Asso. C. M. v. Ellis, 26 Idaho, 438, 144 P. 6, L.R.A.1915E, 917; State v. Bartles Oil Co. 132 Minn. 138, 155 N. W. 1035, L.R.A.1916D, 193; State v. Schuman, 36 Or. 16, 58 P. 661, 47 L.R.A. 153, 78 Am. St. Rep. 754; Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198.

A state may, in the exercise of its police powers, exclude from its territory or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743.

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. National Fertilizer Asso. v. Bradley, 301 U. S. 178, 81 L. ed. 991, 57 S. Ct. 748; Corn Products Ref. Co. v. Eddy, 249 U. S. 427, 63 L. ed. 689, 39 S. Ct. 325.

The restriction of the sale of lightning rods is a proper exercise of the police power. State v. Stevens, 78 N. H. 268, 99 A. 723, L.R.A.1917C, 528.

[5] State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336.

[6] See Food [Also 11 R. C. L. p. 1095, §§ 1

With respect to sales of other commodities, the general rule that wherever fraud may exist or the opportunity for imposition may be possible, police regulation is valid[7] applies with particular emphasis. Thus, a statute providing that any person purchasing for his own use any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery shall have a reasonable time after delivery for inspection and test, that if such article does not prove to be reasonably fit for the purpose for which it was purchased, the purchaser may rescind the sale by giving notice within a reasonable time after delivery, and that any contract provision to the contrary shall be void as against public policy, is valid.[8] Outstanding examples of police legislation designed to prevent fraudulent transactions in relation to the sale of merchandise and dealings therein are the Bulk Sales Acts now in effect in practically all jurisdictions. These laws protect creditors of businesses from fraudulent transfers of assets, and although they were held invalid in a few jurisdictions in the early stage of their development, they are now held to be a valid exercise of the police power by practically all of the courts.[9] In a similar fashion the "blue sky laws," designed to eliminate frauds and to provide honest and fair dealing in transactions relating to the issuance, sale, and transfer of securities, have been consistently held in the later cases in which their validity has been assailed to be constitutional police measures.[10] Moreover, for the same reasons, the state may forbid auction sales at certain times, such as at night, and in certain places, particularly with reference to such types of merchandise as jewelry, and may in other instances hedge about such transactions with regulations conducive to the prevention of imposition.[11] In any event such fraud-preventing regulations must be reasonable, and if regulation alone will afford the requisite protection, absolute prohibition is unconstitutional. For example, the prohibition of the use of shoddy in the manufacture and subsequent sale of comfortables for beds cannot be sustained as necessary to prevent deception, since purchasers may be protected by requirements of designation of materials entering into such manufacture.[12]

In many other cases the police power of the state has been successfully invoked to regulate sales. Such power has been exercised in statutes regulating marketing,[13] restricting or regulating the sale of patent medicines to druggists and the sale of such articles by druggists to the public,[14] and regulating the

et seq.]; Weights and Measures [Also 28 R. C. L. p. 2, § 1; p. 8, § 10].

[7] See supra, § 273.

[8] Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285.

Annotation: 78 A.L.R. 1363, s. 87 A.L.R. 290.

[9] See Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174 (a leading case), and Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809, L.R.A.1917E, 549, Ann. Cas. 1917B, 273, in which Cardozo, J., shows the trend of the authorities.

For a detailed discussion, see Fraudulent Conveyances [Also 12 R. C. L. p. 528, § 57].

[10] Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Cities Serv. Co. v. Koeneke, 137 Kan. 7, 20 P. (2d) 460, 87 A.L.R. 16; Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A.L.R. 1; State v. Swenson, 172 Minn. 277, 215 N. W. 177, 54 A.L.R. 490.

Annotation: 87 A.L.R. 45 et seq.

For a detailed discussion of such laws, see Securities Acts.

[11] Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766; Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A.L.R. 760.

See Auctions, Vol. 5, p. 450, § 7.

[12] Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320. See also People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065.

The constitutional guaranties of liberty and the protection of property rights are violated by an arbitrary prohibition of the sale of provisions where dry goods, clothing, jewelry, and drugs are sold, since such a prohibition is not a valid exercise of the police power. Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L.R.A. 261, 75 Am. St. Rep. 93. Annotation: 48 L.R.A. 261.

[13] See Markets and Marketing Statutes [Also 18 R. C. L. p. 373, § 7].

[14] See Drugs and Druggists [Also 9 R. C. L. p. 701, § 6].

sale of railroad tickets, by confining their sale to the agents of the company issuing them and making it a penal offense for any other person to sell them,[14] although as to the last-named act, in some jurisdictions a different conclusion has been reached.[16] With respect to theater tickets the courts incline towards denying the right of the state under its police power to prohibit their resale even at an advance over the original price paid for them, since such sale is not looked upon as immoral or injurious to public welfare.[17] In such cases, prohibiting a broker in theater tickets from selling them at an advance over the price charged at the box office has been held to be an unconstitutional deprivation of liberty and property.[18]

The courts in the several jurisdictions differ greatly in their attitude toward the validity of laws restricting the issuance of trading stamps as a device to further sales of merchandise, and authority on this question is fairly well divided, although many of the recent cases sustain such legislation.[19]

§ 282. —As to Price.—Legislation concerning sales of goods,[20] and incidentally affecting prices, has repeatedly been held valid.[1] Although the Supreme Court has held that the power of the government to fix prices does not ordinarily exist with respect to merely private property or business, but exists only where the business or property involved has become affected with a public interest,[2] and that therefore a state legislature is without constitutional power to fix prices at which commodities may be sold, unless the business involved is so affected,[3] it has stated in a later case that these decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws therein invalidated were found to be arbitrary in their operation and effect, and that there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.[4] Hence, the private character of a business does not necessarily exempt it from the regulation of prices by the state,[5] for where an industry is subject to regulation in the public interest, the due process clause does not prevent the state from correcting maladjustments by fixing the prices of products and commodities of the industry.[6] Price control is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the

15 See CARRIERS, Vol. 9, p. 466, § 59.

16 People ex rel. Tyroler v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763; State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798.

17 Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.
Annotation: 38 A.L.R. 623, s. 58 A.L.R. 1255; 5 L.R.A.(N.S.) 183; 9 Ann. Cas. 749.
See also THEATERS, SHOWS, EXHIBITIONS AND PUBLIC RESORTS [Also 26 R. C. L. p. 706, § 10].

18 People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.

19 Annotation: 26 A.L.R. 707.
See TRADING STAMPS [Also 26 R. C. L. p. 915, §§ 4 et seq.].

20 See supra, § 281.

1 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

2 Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.
As to businesses affected with a public interest, see infra, §§ 293 et seq.
As to regulation of prices or rates which public utilities may charge for their services, see PUBLIC UTILITIES AND SERVICES.

3 Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596.

4 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

5 Ibid.

6 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.
As to the validity of police regulations to restrict monopolistic practices generally see MONOPOLIES, COMBINATIONS, AND RESTRAINTS OF TRADE [Also 19 R. C. L. p. 98, § 70].

legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.[7]

The right of the owner of a commodity to determine the price at which he may resell it is subject to the legitimate exercise of the police power.[8]

§ 283. —As to Advertising.—In a great many ways the police power of the state and its political subdivisions is exercised to regulate advertising.[9] The police power is thus exercised to regulate the distribution of advertising matter and in some instances to forbid entirely the distribution of matter advertising certain types of merchandise,[10] as, for example, to prohibit the giving away of samples of medicine or deleterious substances.[11] Moreover, the power has been exercised to prohibit the posting or distributing of election circulars without placing in a conspicuous place thereon the names of officers of the organization or the name of the voter who is responsible therefor.[12] Such regulations are often prompted by the public need to prevent littering of the streets and sidewalks.[13]

The police power is exercised generally to prevent advertising which is fraudulent,[14] obscene,[15] or otherwise objectionable from the standpoint of the public safety and morals.[16] Thus, it has been held that a state may forbid or prohibit advertisements of the sale of intoxicating liquor.[17] A contrary conclusion has been reached, however, as to the validity of a municipal ordinance forbidding such advertising on the theory that as long as the manufacture of intoxicating liquors is lawful, their advertisement cannot be prohibited even though the use of such liquors may be objectionable to many people.[18] A state statute prohibiting tobacco advertising on billboards, street car signs, and placards, while permitting it in newspapers and magazines, is valid.[19] It has been held, however, that a state does not have the power to prohibit the circulation of a newspaper published in another state containing advertisements of cigarettes, because such regulation is an invalid interference with interstate commerce.[20] In a similar decision the conclusion has been reached that the state cannot forbid the publication of tobacco advertisements so far as a newspaper circulating in interstate commerce is concerned, which carries the advertisement of a nonresident advertiser, where the sale of such articles is not prohibited in the state, but merely regulated.[1] Furthermore, a similar law forbidding the advertising of cigarettes in any newspaper or periodical published in a state has been held to be an interference with inter-

7 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

8 Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476.
For a detailed discussion of statutes validating contracts by which the producer of a product fixes the resale price of commodities sold under his trademark, see MONOPOLIES, COMBINATIONS, AND RESTRAINTS OF TRADE [Also 19 R. C. L. p. 135, § 102, and R. C. L. 1937 Supp. § 102a].

9 Annotation: Ann. Cas. 1916A, 900.

10 Annotation: 22 A.L.R. 1484, 1489.

11 Ayres v. State, 178 Ind. 453, 99 N. E. 730, Ann. Cas. 1915C, 549; State v. Cray, 85 Vt. 99, 81 A. 450, 36 L.R.A.(N.S.) 630.

12 Annotation: 22 A.L.R. 1489.

13 See HIGHWAYS, STREETS AND SIDEWALKS [Also 13 R. C. L. p. 267, § 219].

14 Annotation: Ann. Cas. 1916A, 901.

15 People v. Kennedy, 176 Mich. 384, 142 N. W. 771, Ann. Cas. 1916A, 895 (advertising cure for venereal disease).
Annotation: Ann. Cas. 1916A, 902 et seq., 910.

16 Annotation: Ann. Cas. 1916A, 904 et seq.

17 State ex rel. Black v. Delaye, 193 Ala. 500, 68 So. 993, L.R.A.1915E, 640.
Annotation: Ann. Cas. 1916A, 905.

18 Haskell v. Howard, 269 Ill. 550, 109 N. E. 992, L.R.A.1916B, 893.
Annotation: Ann. Cas. 1916A, 905.

19 Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546.
Annotation: 79 A.L.R. 551.

20 Annotation: 20 A.L.R. 930.

1 State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553.

state commerce, and further to be unjustly discriminatory and a denial of personal and property rights guaranteed by the Federal Constitution.[2]

The right of municipalities to regulate billboard advertising is now generally upheld, although there is some conflict of authority on the question.[3]

F. Regulation and Prohibition of Occupations and Businesses

1. Regulation

§ 284. Generally.—The general rule is well settled by a great many cases dealing with almost every type of enterprise, trade, occupation, and profession that the state under its police power has the right to regulate any and all kinds of business in order to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification.[4] Thus, if a vocation or

[2] Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100.

[3] See Municipal Corporations [Also 19 R. C. L. p. 834, § 140].

[4] **United States.**—Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 S. Ct. 359; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 S. Ct. 644; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 S. Ct. 144; Cronin v. Adams, 192 U. S. 108, 48 L. ed. 365, 24 S. Ct. 219; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997.

Alabama.—Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333.

Arkansas.—Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

California.—Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; Re Barmore, 174 Cal. 286, 163 P. 50, L.R.A.1917D, 688; Re Cardinal, 170 Cal. 519, 150 P. 348, L.R.A. 1915F, 850; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, affirmed in 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878.

Connecticut. — State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

Florida.—State ex rel. Garrison v. Reeve, 104 Fla. 196, 139 So. 817, 79 A.L.R. 1119; Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693, L.R.A.1918E, 639.

Georgia.—Clein v. Atlanta, 164 Ga. 529, 139 S. E. 46, 53 A.L.R. 933; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105; Cassidy v. Wiley, 141 Ga. 331, 80 S. E. 1046, 51 L.R.A.(N.S.) 128; Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L.R.A. 181.

Idaho.—State v. Armstrong, 38 Idaho, 493, 225 P. 491, 33 A.L.R. 835.

Illinois.—People v. Witte, 315 Ill. 282, 146 N. E. 178, 37 A.L.R. 672; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A. (N.S.) 893; Landberg v. Chicago, 237 Ill. 112, 86 N. E. 638, 21 L.R.A.(N.S.) 830, 127 Am. St. Rep. 319.

Indiana.—Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 705; Selvage v. Talbott, 175 Ind. 648, 95 N. E. 114, 33 L.R.A.(N.S.) 973, Ann. Cas. 1913C, 724; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N. E. 961, 10 L.R.A.(N.S.) 780, 11 Ann. Cas. 635.

Kansas. — Ratcliff v. Wichita Union Stock Yards Co. 74 Kan. 1, 86 P. 150, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016; Blaker v. Hood, 53 Kan. 499, 36 P. 1115, 24 L.R.A. 854.

Kentucky.—Blue Coach Lines v. Lewis, 220 Ky. 116, 294 S. W. 1080, citing R. C. L.; Craig v. E. H. Taylor, Jr. & Sons, 192 Ky. 36, 232 S. W. 395, citing R. C. L.; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811; Kentucky State Journal Co. v. Workmen's Comp. Bd. 161 Ky. 562, 162 Ky. 387, 170 S. W. 1166, 172 S. W. 674, L.R.A.1916A, 389, Ann. Cas. 1916B, 1273.

Louisiana.—State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262, L.R.A. 1915B, 859, Ann. Cas. 1916C, 1274.

Maryland.—Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Standard Brewing Co. v. Weil, 129 Md. 487, 99 A. 661, L.R.A.1917C, 929, Ann. Cas. 1918D, 1143.

Massachusetts.—Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080.

Michigan.—Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273.

Minnesota. — Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733; Kanne v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 137 N. W. 170, 41 L.R.A.(N.S.) 1041; State ex rel. Powell v. State Medical Examining Bd. 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575.

Mississippi.—Vicksburg v. Mullane, 104 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421.

Missouri.—St. Louis v. Fischer, 167 Mo. 654, 67 S. W. 872, 64 L.R.A. 679, 99 Am. St. Rep. 614, affirmed in 194 U. S. 361, 48 L. ed. 1018, 24 S. Ct. 673; State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L.R.A. 243, 40 Am. St. Rep. 388.

the mode of exercising it is injurious to the rights of others or is inconsistent with the public welfare, it may be regulated and restrained by the state.[5] The view has even been taken that it is not always prerequisite to regulation that a business affects injuriously the public at large, but that it may be regulated if it affects injuriously those engaged in it or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large.[6] Moreover, it has been held that if a business itself is a proper subject of police regulation, so are all of its incidents and accessories.[7]

Lawfulness of a calling is not necessarily a criterion of exemption from police regulation. The power is not confined to the regulation of such classes of business as are essentially illegal,[8] for it extends likewise to lawful callings.[9]

New York.—Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A.L.R. 766; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325.

Ohio.—Grown v. Cleveland, 125 Ohio St. 455, 181 N. E. 897, 84 A.L.R. 708; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686.

Oklahoma.—Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Walcher v. First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593.

Oregon.—George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; Re Oberg, 21 Or. 406, 28 P. 130, 14 L.R.A. 577.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

Texas. — Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.

Utah.—State v. Bayer, 34 Utah, 257, 97 P. 129, 19 L.R.A.(N.S.) 297.

Vermont.—State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100.

Virginia.—Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

Washington.—State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

Wisconsin.—State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

For regulations as to any particular type of business, occupation, or profession, see the specific title involved.

As to the right of the state to safeguard the public from incapacity in skilled callings, see supra, § 275.

As to constitutional limitations on classification, see infra, Vol. 12, Subd. XIII.

[5] Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A. (N.S.) 408, Ann. Cas. 1915C, 804; State v. Snowman, 94 Me. 99, 46 A. 815, 50 L.R.A. 544, 80 Am. St. Rep. 380; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

The legislature may impose conditions upon the exercise by either an individual or a corporation of a calling or business attended with danger to other persons and their property, and may prescribe the terms on which such dangerous calling or business will be permitted to be carried on. Jensen v. South Dakota C. R. Co. 25 S. D. 506, 127 N. W. 650, 35 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 700.

[6] Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

See infra, § 287.

[7] State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498.

The regulation of a business includes the manner of conducting the business which may be the erection of structures; it includes also the structure in which the business may be conducted. Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L.R.A. 548, 79 Am. St. Rep. 659.

[8] Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369, 44 L.R.A. (N.S.) 1039; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

[9] Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 S. Ct. 692; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957, writ of certiorari denied in 218 U. S. 673, 54 L. ed. 1205, 31 S. Ct. 223; Sifers v. Johnson, 7 Idaho, 798, 65 P. 709, 54 L.R.A. 785, 97 Am. St. Rep. 271; Douglas v. People, 225 Ill. 536, 80 N. E. 341, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162; State v. Bair, 112 Iowa, 466, 84 N. W. 532, 51 L.R.A. 776; Com. v. Sisson, 189

When any business, lawful in nature, is such that it may be conducted in such a way as to become harmful to the public or when supervision is necessary to confine it to legitimate channels, the state has a right to throw around it such safeguards as will fully protect the public.[10] Thus, the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression[11] or fraud.[12] Moreover, a business may be regulated although it is not a nuisance per se.[13] In connection with this application of the general rules to lawful callings, it has been declared that the right of regulation is an exception to the general rule that every person has a right to pursue any lawful calling.[14]

Another rule which is well settled is that there can be no doubt of the right of the state to regulate a business which may become unlawful by the use of improper and unlawful means,[15] since the right to exercise the police power is a continuing one, and a business lawful today may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare and be required to yield to the public good.[16]

§ 285. Constitutional Limitations on Right to Regulate.—The power of the legislature to impose restrictions on a lawful calling must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt.[17] Hence,

Mass. 247, 75 N. E. 619, 1 L.R.A.(N.S.) 752, 109 Am. St. Rep. 630; Power v. Nordstrom, 150 Minn. 228, 184 N. W. 967, 18 A.L.R. 733; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 126 N. W. 120, 30 L.R.A. (N.S.) 966; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Butte v. Paltrovich, 30 Mont. 18, 75 P. 521, 104 Am. St. Rep. 698; People v. Wilber, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A.(N.S.) 357, 19 Ann. Cas. 626; State v. Randolph, 23 Or. 74, 31 P. 201, 17 L.R.A. 470, 37 Am. St. Rep. 655; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[10] State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336.

[11] People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

[12] People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260.

[13] State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962.

[14] As to the right to engage in occupations generally, see infra, §§ 336, 337.

[15] State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276.

[16] Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

[17] Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; State v. Hinman, 65 N. H. 103, 18 A. 194, 23 Am. St. Rep. 22; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

Police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and when so applied that all persons may not engage in legitimate callings upon equal terms, are void. State ex rel. Wooldridge v. Morehead, 100 Neb. 864, 161 N. W. 569, L.R.A.1917D, 310.

Prohibiting the manufacture of brick within a designated area cannot be said to deny the equal protection of the laws to the owner of a brickyard within the prohibited district where the record does not show that brickyards in other localities within the municipality where the same conditions exist are not regulated or prohibited or that other objectionable businesses are permitted within the same district. Hadacheck v. Sebastian, 239 U. S.

if a statute allows one class of persons to engage in what is presumptively a legitimate business while denying such right to others, it must be based upon some principle which may reasonably promote the public health, safety, or welfare.[18] Statutes prescribing different rules and qualifications, however, for persons who may thereafter seek to engage in occupations subject to the police power from those rules prescribed as to persons already lawfully pursuing such occupations are not void as denying equal protection of the law.[19]

Regulation of occupations cannot be valid where it amounts to an arbitrary or unwarranted interference with the right of the citizen to pursue any lawful business.[20] It is dependent upon a reasonable necessity for its exercise to protect the health, safety, morals, or general welfare of the state,[1] and unless an act restricting the ordinary occupations of life can be shown to fall within these objects of the police power, the act is void.[2] If a lawful business is of a beneficial character, and not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever.[3]

§ 286. Form of Regulation.—The reasonableness, and hence the validity, of a regulation of a business depends on the facts. A regulation valid for one sort of business or in given circumstances may be invalid for another business

394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

[18] State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736.

[19] New Orleans v. Smythe, 116 La. 685, 41 So. 33, 6 L.R.A.(N.S.) 722, 114 Am. St. Rep. 566.

[20] See infra, §§ 336, 337.

[1] Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.(N.S.) 344, Ann. Cas. 1912A, 1247; State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A.(N.S.) 179; Davison v. Chicago & N. W. R. Co. 100 Neb. 462, 160 N. W. 877, L.R.A.1917C, 135; People v. Ringe, 197 N. Y. 143, 90 N. E. 451, 27 L.R.A.(N.S.) 528, 18 Ann. Cas. 474; Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

Any statute or municipal ordinance enacted pursuant thereto which challenges the right of any person to engage in a legitimate and honest occupation, such as that of plumbing, without restraint or regulation must find its justification in the fact that such a statute or ordinance is necessary to promote the general welfare. Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

[2] Doe v. Jones, 327 Ill. 387, 158 N. E. 703, 55 A.L.R. 303. See also New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371, holding that the opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is entitled to protection under the Fourteenth Amendment and that unreasonable or arbitrary interference with, or restrictions on, the common right to engage in a lawful private business cannot be saved from the condemnation of the Fourteenth Amendment by calling them experimental.

The vocation of cement contractor does not affect either the health, morals, safety, or welfare of the public generally; hence, it is not a proper subject of police regulation. State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[3] Frost v. Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas. 1917D, 1127; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; Barnard & Miller v. Chicago, 316 Ill. 519, 147 N. E. 384, 38 A.L.R. 1533; People v. Brazee, 183 Mich. 259, 149 N. W. 1053, L.R.A.1916E, 1146, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 S. Ct. 561, Ann. Cas. 1917C, 522; People ex rel. Valentine v. Berrien Circuit Judge (People ex rel. Valentine v. Coolidge) 124 Mich. 664, 83 N. W. 594, 50 L.R.A. 493, 83 Am. St. Rep. 352; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

No trade, occupation, or business can be subjected to police regulation of any kind unless its prosecution involves some harm or injury to the public or third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained. State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756.

A statute which nowhere attempts to protect any public interest or defend against any public wrong and which shows upon its face that regulation is not its purpose, but that revenue or undue restriction of a business in the interest of others is the aim in view, cannot be sustained as an exercise of the police power, although it purports to be "An Act to Regulate Business and Trade." State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765.

A city cannot use the police power to say arbitrarily what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public. Re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas. 1917D, 1127.

or for the same business under other circumstances.[4] Different callings may be regulated in different ways because of the manner in which they affect the public. One court has gone to the extent of stating that although professions or trades operating directly on the person, and thereby directly affecting the health, comfort, and safety of the public, may be regulated by the legislature under the police power, other professions or trades cannot be regulated without depriving a citizen of his natural rights guaranteed by the Constitution.[5] A classification of the types of business and the extent of regulation applicable to each, which is perhaps more accurate, has been adopted elsewhere, the court declaring that business of a character which places it within the category of social and economic evils, such as gaming and the liquor traffic, and such useful occupations as may under certain circumstances become public and private nuisances, because offensive or dangerous to health, fall within the broad legislative power of prohibition or suppression, some wholly and absolutely and others conditionally. Such pursuits as agriculture, merchandise, manufacturing, and industrial trades cannot be dealt with at will by the legislature. As to them, the power of regulation is comparatively slight when they are conducted and carried on upon private property and with private means.[6]

There is no particular form which the regulation of a business must take,[7] since it may vary with the nature of the business.[8] It should be observed, however, that it is the nature of a business rather than the form of the organization by which it is carried on which justifies the state in exercising supervision over it.[9] If a business from its nature so affects the public as to be subject to any regulation,[10] in accordance with the general principle that the legislature possesses great discretion in the exercise of the police power[11] it may determine not only what trades or occupations shall be regulated,[12] but the nature and extent of the regulations,[13] adopting any measures, not in conflict with the Constitution, that it sees fit, provided they have some relation to, and some tendency to accomplish, the desired end.[14] If the measures adopted have such a relation or tendency, the courts will never assume to determine whether they are wise or whether they are the best that might have been adopted.[15]

Some callings, because of the dangerous character of the articles used, manufactured, or sold, require special qualifications in the persons permitted

4 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

5 State ex rel. Garrison v. Reeve, 104 Fla. 196, 139 So. 817, 79 A.L.R. 1119.

6 Northwestern Nat. Ins. Co. v. Fishback, 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840.

As to prohibition of certain businesses, see infra, §§ 291, 292.

7 State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466.

8 Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13.

9 McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259.

10 See supra, § 285.

11 See infra, §§ 305, 306.

12 Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105.

13 Cooper v. Rollins, 152 Ga. 588, 110 S. E. 726, 20 A.L.R. 1105.

14 Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182; State v. Armstrong, 38 Idaho, 493, 225 P. 491, 33 A.L.R. 835; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 38 L.R.A. 672, 64 Am. St. Rep. 482; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498; Rippe v. Becker, 56 Minn. 100, 57 N. E. 331, 22 L.R.A. 857, 45 Am. St. Rep. 454; Henry v. State, 97 Tex. Crim. Rep. 67, 260 S. W. 190, citing R. C. L.; McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 71 P. 37, 60 L.R.A. 947, 94 Am. St. Rep. 889.

Annotation: 21 L.R.A. 794.

15 State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 64 Am. St. Rep. 482, 38 L.R.A. 672; State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L.R.A. 498.

See also supra, § 138; infra, § 306.

to use, manufacture, or sell them.[16] Others may be permitted to be conducted only if protective devices are used.[17]

A business may be permitted only in certain forms and a sum of money may be exacted from the individuals conducting it for the purpose of recompensing those who suffer losses thereby.[18] Thus, statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen have been upheld in some states.[19] Similarly, it has been held that a state may properly require persons engaged in certain occupations to deposit certain sums of money[20] or to file a bond as security for compliance with the regulations relating to the occupation.[1] It may also require persons engaged in particular professions to make reports to state officials.[2]

§ 287. —As to Place.—Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them require regulation as to the locality in which they shall be conducted;[3] in some instances the conduct of a business in a particular place may be prohibited entirely.[4] Thus, certain business pursuits may be confined to portions of a municipality other than the residence district, such as livery stables, brickyards, and the like, because of their impairment of the health and comfort of the occupants of neighboring property.[5] The installation and operation of an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within a specified distance of a church, school, or hospital may be prohibited.[6] In many cases statutes have been held valid which have absolutely prohibited certain kinds of employment or the carrying on of particular occupations in the basements of premises or in crowded or tenement districts, where the prohibition of such activity has a reasonable relation to the public

16 Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13.

17 State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466.

18 Ibid.

19 Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466 (recognizing rule).

Contra.—Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A.(N.S.) 1147, 125 Am. St. Rep. 818, holding that the police power does not extend to requiring insurance companies doing business in cities to pay a portion of their earnings to a firemen's relief association for the benefit of disabled firemen and their families.

Annotation: 13 L.R.A.(N.S.) 1147.

20 State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L.R.A. 100.

1 See LICENSES [Also 17 R. C. L. p. 546, § 60].

2 Robinson v. Hamilton, 60 Iowa, 134, 14 N. W. 202, 46 Am. Rep. 63.

3 Pierce Oil Corp. v. Hope, 248 U. S. 498, 63 L. ed. 381, 39 S. Ct. 172; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 S. Ct. 511; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050. See also Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A. (N.S.) 153.

For municipal regulation as to location of particular occupations, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 818, § 123]; ZONING.

4 State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A. (N.S.) 466.

5 Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201.

See ZONING.

6 Walcher v. Norman First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593.

Annotation: 6 A.L.R. 1597 (laundries).

In some jurisdictions, however, ordinances prohibiting the maintenance of a laundry except within certain specified districts of a city have been held invalid.

Annotation: 6 A.L.R. 1598.

As to regulations concerning the location of cemeteries, see CEMETERIES, Vol. 10, p. 497, § 15.

As to regulations concerning the location of garages, see GARAGES, PARKING STATIONS, AND LIVERIES.

As to regulations concerning the location of gas and oil wells, see GAS AND OIL.

As to regulations concerning the location of moving picture theaters, see THEATERS, SHOWS, EXHIBITIONS, AND PUBLIC RESORTS [Also 26 R. C. L. p. 701, § 6].

health.[7] Elsewhere the courts have taken the position that a law forbidding the carrying on of certain types of business in basements or cellars is invalid as improper class legislation, since all basements are not in and of themselves harmful to health and a clean and well-ventilated basement might be a more healthful place in which to carry on the occupation than a poorly ventilated room on another floor.[8] Recent regulation has extended to the point of legislative attempts to restrict one from carrying on a mere mercantile business on one's own premises in certain areas of a municipality. Although the early cases passing upon this exercise of restrictive power were divided and many of the authorities took the position that such legislation was invalid because it did not specifically affect the safety and welfare of the community, the trend of the later decisions has been to support such restrictions as a proper exercise of the police power affecting the general welfare in accordance with the modern trend to uphold zoning regulations.[9]

§ 288. —As to Time.—As a general proposition, regulations fixing a closing hour for business depend for their validity upon the nature of the business sought to be regulated.[10] Such laws are valid if the public health, safety, morals, or welfare may be affected by keeping the business open after certain hours.[11] Laws requiring certain establishments to close at a particular hour and remain closed until a particular hour the following morning have been sustained where they relate to sales or other transactions in places such as billiard parlors or cigar stores, in which instance a definite relationship to the public morals is established.[12] On the other hand, laws requiring businesses of a purely mercantile and commercial nature to close at a specified time have been held to be unconstitutional.[13] A particular lawful business in no wise noxious cannot be regulated as to closing hours while other businesses are left unregulated.[14]

2. Regulation of Specific Occupations and Businesses

§ 289. Generally.—In the determination of the right of the state under the police power to regulate an occupation or business, the nature of the business is of prime importance.[15] This principle manifests itself in the numerous and varied regulations with which the legislature surrounds different callings.

7 Annotation: 44 L.R.A.(N.S.) 46; Ann. Cas. 1914A, 1132.

8 People v. Schenck, 257 Ill. 384, 100 N. E. 994, 44 L.R.A.(N.S.) 46, Ann. Cas. 1914A, 1129.

9 See Zoning.

10 Annotation: 55 A.L.R. 242.

11 People v. Kuc, 272 N. Y. 72, 4 N. E. (2d) 939, 107 A.L.R. 1272; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.
Annotation: 55 A.L.R. 242.

12 Churchill v. Albany, 65 Or. 442, 133 P. 632, Ann. Cas. 1915A, 1094.
Annotation: 55 A.L.R. 250, 252; Ann. Cas. 1915A, 1097; Ann. Cas. 1918D, 200.
As to cigar stores, however, see also Saville v. Corless, 46 Utah, 495, 151 P. 51, Ann. Cas. 1918D, 198, infra, note 13, this section.
As to pawnbrokers, secondhand dealers, and peddlers, see specific titles involved.
As to auctions, see Auctions, Vol. 5, p. 450, § 7.
As to laundries, see Labor [Also 16 R. C. L. p. 496, § 67].

13 Ex parte Harrell, 76 Fla. 4, 79 So. 168, L.R.A.1918F, 514; Saville v. Corless, 46 Utah, 495, 151 P. 51, Ann. Cas. 1918D, 198. See State v. Ray, 131 N. C. 814, 42 S. E. 960, 60 L.R.A. 634, 92 Am. St. Rep. 795.
Annotation: 55 A.L.R. 247; L.R.A.1916A, 654; Ann. Cas. 1915A, 1097; Ann. Cas. 1918D, 200.
An act requiring stores to close at 6 P. M. is invalid as an exercise of the police power, since the men's furnishing and jewelry business conducted by one of the petitioners without help and the retail cigar business of the other petitioner do not affect the health or safety of those engaged in it, and since the act fixes a closing hour and is not directed to enterprises affecting the health, morals, safety, or general welfare. Saville v. Corless, 46 Utah, 495, 151 P. 51, Ann. Cas. 1918D, 198.
As to barber shops, see Barbers and Beauty Specialists, Vol. 7, p. 617, § 8.

14 Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230.

15 See supra, § 286.

Callings which in any manner affect the public morals and peace are under strict surveillance.[16] Because of certain peculiar aspects, the businesses of pawnbroking[17] and junk or secondhand dealing[18] are stringently regulated. Private detectives are also subject to careful supervision and control.[19] The conduct of amusement enterprises may or may not be innocuous. Since those exercising useful trades and occupations, however, do not occupy the same relation to society as those engaged solely in giving amusement to the public, a much larger discretion should be given in regulating the latter than the former.[20] Thus, keepers of billiard tables are not usually recognized by the state as exercising a useful occupation.[1] For the same or a similar reason dancing establishments, dance halls, and the running of public dances may be regulated or certain matters pertaining thereto may be forbidden or suppressed.[2] Although not a business so directly connected with the public morals as the foregoing amusements, the business of keeping hotels, lodging-houses, roominghouses, boardinghouses, or tenements is one so far affecting the public health, morals, and welfare as to be subject to police regulation.[3]

Businesses connected with financial transactions generally, such as the management of funds belonging to the general public and loans to members of the public, are clearly related to the general welfare, hence subject to police regulation.[4] Thus, it is generally recognized that the banking business is of such a character as to warrant the legislature to impose reasonable regulations upon the means and methods by which it is conducted.[5] The same principle renders valid various regulations pertaining to building and loan associations.[6] Moreover, because of the very relation of such institutions to the public welfare, legislation has been sustained providing for the relief of banks or building and loan associations in need of cash or cash resources by temporary loans from a corporation the assets of which are obtained by requiring all such institutions to contribute a small percentage of their deposits to it.[7] Legislation regulating the rate of interest which may be charged is a specific example of the application of the police power to financial transactions.[8] Not only may

16 See supra, § 272.

17 See Pawnbrokers [Also Pledge, 21 R. C. L. p. 698, § 56].
As to municipal regulation of pawnbrokers, see Municipal Corporations [Also 19 R. C. L. p. 861, § 163].

18 See Secondhand Dealers [Also Sales, 23 R. C. L. p. 1192, § 7].
As to municipal regulation of junk and secondhand dealers, see Municipal Corporations [Also 19 R. C. L. p. 862, § 164].

19 Lehon v. Atlanta, 242 U. S. 53, 61 L. ed. 145, 37 S. Ct. 70; State v. Bennett, 102 Mo. 356, 14 S. W. 865, 10 L.R.A. 717.
Annotation: 61 L. ed. 146; Ann. Cas. 1917A, 584.

20 Burlingame v. Thompson, 74 Kan. 393, 86 P. 449, 11 Ann. Cas. 64; Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

1 See Theaters, Shows, Exhibitions, and Public Resorts [Also 26 R. C. L. p. 698, § 4].
As to municipal regulation, see Municipal Corporations [Also 19 R. C. L. p. 867, § 169; p. 960, § 258].
As to the suppression of such matters as nuisances, see Nuisances [Also 20 R. C. L. p. 418, § 33].

2 See Theaters, Shows, Exhibitions, and Public Resorts [Also 26 R. C. L. p. 698, § 4].
As to municipal regulation, see Municipal Corporations [Also 19 R. C. L. p. 867, § 169; p. 960, § 258].
As to the suppression of such matters as nuisances, see Nuisances [Also 20 R. C. L. p. 418, § 33].

3 Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364, 36 S. Ct. 147; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A. 1915B, 1097, Ann. Cas. 1916C, 280; State ex rel. Altop v. Billings, 79 Mont. 25, 255 P. 11, 54 A.L.R. 1091; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.
See Innkeepers [Also 14 R. C. L. p. 496, § 5].

4 See infra, notes 5–11, this section.

5 See Banks, Vol. 7, p. 30, §§ 9 et seq.

6 See Building and Loan Associations, Vol. 9, p. 102, § 8.

7 Opinion of Justices, 278 Mass. 607, 181 N. E. 833, 82 A.L.R. 1021.
Annotation: 82 A.L.R. 1026.

8 See Interest [Also 15 R. C. L. p. 19, § 16].

usury be prohibited,[9] but laws may be passed fully regulating chattel loan or small loan companies,[10] moneylenders, and wage brokers.[11]

In addition to the power to regulate admission to skilled trades and professions to protect the public from incapacity,[12] the legislature may also regulate the method in which such trades and professions are practiced or conducted. In order to safeguard the public, the state may therefore make proper regulations concerning the practice of medicine and surgery,[13] dentistry,[14] optometry,[15] chiropody,[16] chiropractic,[17] and nursing;[18] it may also regulate the practice of law.[19]

In accordance with the general rule that where the public interest is involved the police power extends to sales and related dealings,[20] many occupations directly connected with selling various commodities, as well as many callings which are themselves methods of vending, are subject to regulation.[1] Thus, commission merchants or wholesale produce dealers,[2] stockbrokers and real-estate brokers,[3] sellers of drugs and proprietary medicines,[4] and peddlers, hawkers, or itinerant merchants,[5] including house-to-house canvassers,[6] are subject to such control as the nature of the occupation and its relation to the public health, safety, morals, or welfare may warrant.

Businesses connected with transportation are regulated. The basis for much of such regulation is that persons so engaged are operating a business

9 See USURY [Also 27 R. C. L. p. 204, § 3].

10 State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402.

For a detailed discussion, see SMALL LOAN COMPANIES.

11 Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864.

12 See supra, § 275.

13 Lambert v. Yellowley, 272 U. S. 581, 71 L. ed. 422, 47 S. Ct. 210, 49 A.L.R. 575; State ex rel. La Prade v. Smith, 43 Ariz. 131, 343, 29 P. (2d) 718, 31 P. (2d) 102, 92 A.L.R. 168; People by Kerner v. United Medical Service, 362 Ill. 442, 200 N. E. 157, 103 A.L.R. 1229; People v. Witte, 315 Ill. 282, 146 N. E. 178, 37 A.L.R. 672; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; Louisiana State Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed in 274 U. S. 720, 71 L. ed. 1324, 47 S. Ct. 590; Laughney v. Maybury, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393.

For a detailed discussion, see PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 363, § 10].

14 State Dental Examiners v. Savelle, 90 Colo. 177, 8 P. (2d) 693, 82 A.L.R. 1176, appeal dismissed in 287 U. S. 562, 77 L. ed. 496, 53 S. Ct. 5.

15 Roschen v. Ward, 279 U. S. 337, 73 L. ed. 722, 49 S. Ct. 336; McNaughton v. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 S. Ct. 178, Ann. Cas. 1917B, 801; Sage-Allen Co. v. Wheeler, 119 Conn. 667, 179 A. 195, 98 A.L.R. 897.

For a detailed discussion, see PHYSICIANS AND SURGEONS.

16 State v. Armstrong, 38 Idaho, 493, 225 P. 491, 33 A.L.R. 835.

17 Louisiana State Medical Examiners v. Fife, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed in 274 U. S. 720, 71 L. ed. 1324, 47 S. Ct. 590; People v. Lewis, 233 Mich. 240, 206 N. W. 553, 42 A.L.R. 1337.

18 People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; State ex rel. Marshall v. District Ct. 50 Mont. 289, 146 P. 743, Ann. Cas. 1917C, 164.

Annotation: Ann. Cas. 1917C, 168.

19 **The constitutional rights of an attorney at law** to liberty and the pursuit of happiness are not interfered with by a statute forbidding him to solicit business either personally or through a solicitor. State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 P. 357, 21 L.R.A.(N.S.) 821, 17 Ann. Cas. 625.

Regulation which aims to bring the conduct of business which is necessarily related to the legal profession into harmony with that profession's ethical practice is obviously reasonable. McCloskey v. Tobin, 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306.

See ATTORNEYS AT LAW, Vol. 5, p. 262, § 2; p. 426, § 274.

20 See supra, § 281.

1 See infra, notes 2–6, this section.

2 State ex rel. Beek v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681, writ of error dismissed in Minnesota ex rel. Mohler v. Megaarden (U. S.) 46 L. ed. 1263, 22 S. Ct. 931; State v. Walter Bowen & Co. 86 Wash. 23, 149 P. 330, Ann. Cas. 1917B, 625; State ex rel. Hickey v. Levitan, 190 Wis. 646, 210 N. W. 111, 48 A.L.R. 434.

Annotation: 48 A.L.R. 449; Ann. Cas. 1917B, 631.

See also FACTORS [Also 11 R. C. L. p. 757, § 7].

3 See BROKERS, Vol. 8, p. 993, §§ 7 et seq.

4 See DRUGS AND DRUGGISTS [Also 9 R. C. L. p. 699, §§ 5, 6].

5 See PEDDLERS [Also 21 R. C. L. p. 187, §§ 8 et seq.].

6 Green River v. Fuller Brush Co. (C. C. A. 10th) 65 F. (2d) 112, 88 A.L.R. 177.

affected with a public interest.[7] Included are carriers generally[8] and, specifically, air lines,[9] railroads,[10] street railways,[11] shipping lines,[12] and motor transportation lines, including all forms of motor carriers.[13] Moreover, the state may regulate and prescribe conditions pertaining to the operation of motor club service associations.[14] The same principle validates the regulation of businesses involving communication.[15]

The rule is established that all trades, callings, and occupations may be regulated which affect the public health.[16] In addition to the professions treating of health specifically,[17] many businesses and callings fall under this category, including barber shops and beauty parlors,[18] laundries,[19] dry cleaning establishments,[20] plumbing,[1] and undertaking.[2] Callings relating to dealing in foodstuffs directly affect the public health and hence are regulated.[3] Among the enterprises affected are bakeries,[4] dairies, meat shops, and confectioneries.[5]

Another class of occupations which properly comes within the range of the

7 See infra, §§ 293 et seq.

8 See CARRIERS, Vol. 9, p. 449, §§ 40 et seq.

9 See AVIATION, Vol. 6, p. 7, §§ 7 et seq.

10 See RAILROADS [Also 22 R. C. L. p. 777, §§ 34 et seq.].

11 See STREET RAILWAYS [Also 25 R. C. L. p. 1178, §§ 59 et seq.].

12 See SHIPPING [Also 24 R. C. L. p. 1036, § 16].

13 See MOTOR TRANSPORTATION.

14 Moore v. Webb, 219 Cal. 304, 26 P. (2d) 22, 89 A.L.R. 925.

Annotation: 89 A.L.R. 930.

15 See RADIO; TELEGRAPHS AND TELEPHONES [Also 26 R. C. L. p. 510, § 25].

16 See HEALTH [Also 12 R. C. L. p. 1283, § 23].

17 See supra, notes 13–18, this section.

18 See BARBERS AND BEAUTY SPECIALISTS, Vol. 7, p. 613, §§ 2 et seq.

19 Re Wong Wing, 167 Cal. 109, 138 P. 695, 51 L.R.A.(N.S.) 361; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66. See also Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 S. Ct. 730, and Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

But see Spann v. Gaither, 152 Md. 1, 136 A. 41, 50 A.L.R. 620, holding that the regulation of a laundry can bear no relation to the public welfare, unless the public safety, order, or morals is affected by the nature of its structure, its location, or its operation.

Annotation: 21 Ann. Cas. 975.

As to the location of a laundry, see supra, § 287.

As to laundries as nuisances, see NUISANCES [Also 20 R. C. L. p. 456, § 71].

20 Klever Shampay Karpet Kleaners v. Chicago, 323 Ill. 368, 154 N. E. 131, 49 A.L.R. 103.

Annotation: 49 A.L.R. 110.

The business of cleaning carpets by steam power is subject to regulation. Ex parte Lacey, 108 Cal. 326, 41 P. 411, 38 L.R.A. 640, 49 Am. St. Rep. 93.

1 **By the great weight of authority, statutes requiring the examination and licensing of plumbers and providing rules and regulations for plumbing and drainage, in the interest of the public health, are valid as a proper exercise of the police power and do not deprive members of the craft affected of personal rights guaranteed by the state and Federal Constitutions.** Douglas v. People, 225 Ill. 536, 80 N. E. 341, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162; Louisville v. Coulter, 177 Ky. 242, 197 S. W. 819, L.R.A.1918A, 811; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L.R.A. 718; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785; New Castle v. Withers, 291 Pa. 216, 139 A. 860, 57 A.L.R. 132. Annotation: 36 A.L.R. 1342, s. 57 A.L.R. 136; 7 Ann. Cas. 580; 18 Ann. Cas. 181. **Contra**—Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333, holding that to require one wishing to work as a plumber to secure a license, after passing such examination as to qualifications and competency in thecretical and practical plumbing as a board of examiners may prescribe, violates his constitutional rights of liberty and property. State ex rel. Richey v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577. Annotation: 36 A.L.R. 1343, s. 57 A.L.R. 136.

As to municipal regulations of plumbing, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 832, § 137].

2 See HEALTH [Also 12 R. C. L. p. 1278, § 17].

As to undertaking or embalming establishments as nuisances, see NUISANCES [Also 20 R. C. L. p. 455, § 70].

3 See FOOD [Also 11 R. C. L. p. 1095, § 2; p. 1102, § 8; p. 1109, §§ 17 et seq.].

4 People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed as to the hours of labor for employees in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Benz v. Kremer, 142 Wis. 1, 125 N. W. 99, 26 L.R.A.(N.S.) 842.

Annotation: 26 L.R.A.(N.S.) 842.

5 See FOOD [Also 11 R. C. L. p. 1109, §§ 17–24].

police power is that which is naturally liable to create a nuisance unless subjected to special regulations, whether or not it is so conducted as in fact to create a nuisance.[6] Many occupations are so regulated.[7] The business of slaughtering animals or conducting slaughterhouses is a typical example.[8] Similarly, the keeping and housing of animals, being peculiarly a business which may or may not be offensive and hurtful according to the manner in which it is carried on, is a proper subject of police regulation.[9]

§ 290. Restriction of Right to Engage in Occupation or Business.[10]—Regulations concerning businesses or occupations often take the form of restrictions upon the carrying on of such occupations. Such restrictions occasionally apply to the class of persons permitted to engage in certain callings. Thus, the state may sometimes limit to corporations the right to engage in a particular business.[11] On the other hand, the state may forbid corporations to practice certain professions calling for skill or personal confidence, restricting the right so to practice to natural persons.[12] It is also competent for the state legislature to enact a law prohibiting persons from practicing certain specified callings without first obtaining a license.[13] In some cases, however, licenses may be either prohibitive or unreasonable, and the attempt to impose them may be unconstitutional as tending to deprive persons of their liberty and property without due process of law.[14] Licenses have been required in order to carry on employment[15] or emigrant agencies,[16] the nursery stock business,[17]

[6] State v. Orr, 68 Conn. 101, 35 A. 770, 34 L.R.A. 279.

[7] See NUISANCES [Also 20 R. C. L. p. 386, §§ 10 et seq.; p. 438, §§ 53 et seq.; p. 447, §§ 62 et seq.].

[8] Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652 (recognizing this principle); Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Schoen Bros. v. Pylant, 162 Ga. 565, 134 S. E. 304, 46 A.L.R. 1480; Beiling v. Evansville, 144 Ind. 644, 42 N. E. 621, 35 L.R.A. 272.

Annotation: 46 A.L.R. 1486.

As to municipal regulation of slaughterhouses, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 819, § 124].

As to slaughterhouses as nuisances, see NUISANCES [Also 20 R. C. L. p. 449, § 64].

[9] Mobile v. Orr, 181 Ala. 308, 61 So. 920, 45 L.R.A.(N.S.) 575.

As to municipal regulation of keeping animals, see MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 820, § 125].

As to keeping of animals as a nuisance, see NUISANCES [Also 20 R. C. L. p. 413, §§ 30, 31].

[10] As to the right to engage in an ordinary business or calling, see infra, § 336.

[11] Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362.

Annotation: 68 L. ed. 742.

A state may confine to corporations the business of collecting money in instalments from small investors and reletting it to them in order of priority, with a chance to forfeit the contract for nonpayment of instalments or to mature it by continued payments, with a possibility of sharing in profits of the transaction. Dillingham v. McLaughlin, 264 U. S. 370, 68 L. ed. 742, 44 S. Ct. 362.

An individual is not denied the equal protection of the laws because he is forbidden to receive deposits in sums less than $500 for relending to depositors upon the chance of forfeiture for default in payments, or sharing in profits at maturity of the contract, although corporations are permitted to do so. Ibid.

See BANKS, Vol. 7, p. 28, § 7; BUILDING AND LOAN ASSOCIATIONS, Vol. 9, p. 101, § 6.

[12] See ATTORNEYS AT LAW, Vol. 5, p. 276, § 25; CORPORATIONS [Also 7 R. C. L. p. 608, § 604]; PHYSICIANS AND SURGEONS [Also 21 R. C. L. p. 365, § 11].

[13] Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; Shuman v. Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L.R.A. 378; State v. Hill, 168 La. 761, 123 So. 317, 69 A.L.R. 574; State ex rel. Ebert v. Loden, 117 Md. 373, 83 A. 564, 40 L.R.A.(N.S.) 193, Ann. Cas. 1913E, 1300; State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L.R.A. 88, 79 Am. St. Rep. 422; State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472.

As to protection from incapacity, see supra, § 275.

For detailed discussion of the occupations and businesses subject to licensing, see LICENSES [Also 17 R. C. L. p. 503, § 28].

[14] Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L.R.A.(N.S.) 1074.

[15] See LABOR [Also 16 R. C. L. p. 476, § 53].

[16] Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758, overruling anything to the contrary in State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472.

Annotation: 5 Ann. Cas. 327.

[17] Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L.R.A.(N.S.) 138.

the business of hawker, huckster, or peddler, etc.,[18] the business of guiding for hunting and fishing parties,[19] and many other occupations or businesses.[20]

3. PROHIBITION OF OCCUPATIONS OR BUSINESSES

§ 291. Generally.—The general rule is well settled that whenever it is necessary for the preservation of the public health, safety, morals, or peace or for the promotion of the general welfare of the community, the legislature may prohibit absolutely the carrying on of any particular business, calling, trade, or enterprise.[1] A calling may not be immoral in itself, and yet the tendency of what is generally, ordinarily, or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, in the consideration of the circumstances that attend or which may ordinarily attend the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling is actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.[2] Moreover, the hand of the legislature cannot be stayed from providing

[18] Chaddock v. Day, 75 Mich. 527, 42 N. W. 977, 4 L.R.A. 809, 13 Am. St. Rep. 468; State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339.

See also LICENSES [Also 17 R. C. L. p. 503, § 28]; PEDDLERS [Also 21 R. C. L. p. 187, § 8].

[19] State v. Snowman, 94 Me. 99, 46 A. 815, 50 L.R.A. 544, 80 Am. St. Rep. 380.

[20] See LICENSES [Also 17 R. C. L. p. 503, § 28]. See also specific titles.

[1] Great Atlantic & P. Tea Co. v. Grosjean, 301 U. S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; Barbour v. Georgia, 249 U. S. 454, 63 L. ed. 704, 39 S. Ct. 316; Eiger v. Garrity, 246 U. S. 97, 62 L. ed. 596, 38 S. Ct. 298; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Giozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 S. Ct. 721; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 9 S. Ct. 6; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Sandelin v. Collins, 1 Cal. (2d) 147, 33 P. (2d) 1009, 93 A.L.R. 956; Ex parte Francis (State ex rel. Frances v. Moran) 76 Fla. 304, 79 So. 753, 2 A.L.R. 1068; Schmitt v. F. W. Cook Brewing Co. 187 Ind. 623, 120 N. E. 19, 3 A.L.R. 270; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13; Myers v. Cincinnati, 128 Ohio St. 235, 190 N. E. 569, citing R. C. L. (slot machines); Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603; Kirk v. State, 126 Tenn. 7, 150 S. W. 83, Ann. Cas. 1913D, 1239; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306), citing R. C. L.; Longmire v. State, 75 Tex. Crim. Rep. 616, 171 S. W. 1165, Ann. Cas. 1917A, 726; Ex parte Townsend, 64 Tex. Crim. Rep. 350, 144 S. W. 628, Ann. Cas. 1914C, 814; Bungalow Amusement Co. v. Seattle, 148 Wash. 485, 269 P. 1043, 60 A.L.R. 166; State v. Neitzel, 69 Wash. 567, 125 P. 939, 43 L.R.A. (N.S.) 203, Ann. Cas. 1914A, 899.

The legislature may suppress any business or calling which is in itself injurious and cannot be so regulated that it will not be detrimental to the public welfare. Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477.

By granting a tax exemption to manufacturers of articles from produce of the state, the people do not deprive themselves of the right to forbid the manufacture of such articles if necessary for the public welfare. Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

The power to prohibit includes the power to regulate, even to the extent that the regulation under given conditions may be tantamount to a prohibition. State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A.1918B, 909, Ann. Cas. 1918C, 942; Tacoma v. Keisel, 68 Wash. 685, 124 P. 137, 40 L.R.A.(N.S.) 757.

[2] Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 32 S. Ct. 697, 41 L.R.A.(N.S.) 153; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A. (N.S.) 179; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.

for the discontinuance of a business by any incidental inconvenience, loss, or expense which individuals or corporations may suffer.[3]

It is a fixed principle that the legislature cannot forbid any person or class of persons from engaging in a lawful business not injurious to others,[4] and a citizen who is willing to comply with all the reasonable regulations which may be imposed upon a calling, occupation, or business which is not necessarily injurious to the community cannot be deprived of his right to pursue it.[5] Hence, a statute cannot be upheld as a police regulation where it confers no benefit on the public or any portion of the community and results only in injury by prohibiting citizens from following a beneficial vocation. The legislature may regulate when regulation will protect, but may not suppress when inhibition will injure the party pursuing the lawful vocation, and proper regulation will prevent injury to others.[6]

A calling may not be prohibited by the legislature, unless it is inherently injurious to the public health, safety, or morals or has a tendency in that direction.[7] Elsewhere it has been held that the test is found in the effect the pursuit of the calling has upon the public welfare rather than in the inherent nature of the calling itself.[8] No matter which test is applied, a police regulation restricting to the extent of prohibiting an ancient, honorable, and necessary calling must be justified on the ground that such prohibition is essential to the public health, safety, convenience, comfort, or morals.[9] Furthermore, to warrant the state in absolutely prohibiting a business, it is not sufficient that it is conducted by methods which do not meet general approval. There must be something in the methods employed which renders it injurious to the public by demoralizing legitimate business, by introducing the element of chance, or by cheating and defrauding purchasers or others. It is not enough that it seriously interferes with, and even destroys, the business of others.[10] Moreover, the legislature cannot prohibit a business if all the reasons assigned for the exercise of the power are merely fanciful.[11]

3 Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927, affirming 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 S. Ct. 464; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Ex parte Young, 154 Cal. 317, 97 P. 822, 22 L.R.A.(N.S.) 330; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Wallace v. Reno, 27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am. St. Rep. 747; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L.R.A. 850; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

A vested interest cannot be asserted against the prohibition of a business under the police power merely because of conditions once obtaining. "To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community." Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

4 See infra, §§ 336, 337.

5 Blaker v. Hood, 53 Kan. 499, 36 P. 1115, 24 L.R.A. 854; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A. (N.S.) 477, Ann. Cas. 1914A, 162; State v. Scougal, 3 S. D. 55, 51 N. W. 853, 15 L.R.A. 477, 44 Am. St. Rep. 756.

6 Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 55 S. E. 572, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124.

The power to enact reasonable regulations bears no relation to the power to prohibit or suppress. Re Dart, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann. Cas. 1917D, 1127.

7 State v. Armstrong, 38 Idaho, 493, 225 P. 491, 33 A.L.R. 835 (chiropody may not be prohibited).

8 Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

9 State ex rel. Kempinger v. Whyte, 177 Wis. 541, 188 N. W. 607, 23 A.L.R. 67.

10 State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818.

§ 292. Illustrations of Prohibited Occupations or Businesses.—There are many callings prohibited under the police power. Such rigid control is generally exercised to forbid the sale of substances deemed noxious to the public.[12] Perhaps the most important instance of the right to prohibit the carrying on of a particular occupation consists of the prohibition of the manufacture and sale of intoxicating liquors.[13] As to the prohibition of nonintoxicants, the authorities are not in complete accord. In some jurisdictions the right of the state to forbid the sale of nonintoxicating liquors has been denied. Elsewhere the courts have sustained legislation prohibiting the sale of nonintoxicants, especially where the prohibition of the sale of nonintoxicating beverages may be necessary to render effective the prohibition of intoxicants.[14]

Anticigarette legislation has met with judicial sanction in some instances, but in other cases it has been held invalid. Thus, while it has been held in some jurisdictions that a state may prohibit within its boundaries the manufacture or sale of cigarettes,[15] there are instances in which it has been held that although the regulation of the tobacco industry is to a certain extent within the police power of the state, the cultivation and use of tobacco cannot be absolutely prohibited.[16] Laws restraining the sale and use of opium or any dangerous drugs are generally sustained as valid under the police power, since by its general use the public health, welfare, and safety may be endangered.[17] A state may also prohibit the sale of dangerous oils.[18]

In its regulation and control of business practices a state may validly forbid

11 Lawton v. Stewart Dry Goods Co. 197 Ky. 394, 247 S. W. 14, 26 A.L.R. 687.

12 See authorities cited infra, notes 13, 15, 17, this section.

13 See INTOXICATING LIQUORS [Also 15 R. C. L. p. 258, §§ 13 et seq.].

14 See INTOXICATING LIQUORS [Also 15 R. C. L. p. 266, § 20].

15 Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132 (recognizing rule); State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13 (snuff).

The police power of a state or municipality extends to the regulation or prohibition of the manufacture or sale and, under some circumstances, the use of cigarettes. This is well settled, and statutes or ordinances designed for these purposes have generally been held valid. Annotation: 20 A.L.R. 926; L.R.A.1918B, 988.

In Kansas at one time there was a statute (Laws 1917, chap. 166) prohibiting the sale of cigarettes or cigarette papers and the keeping of them for barter or sale. This law was held to be a valid exercise of the police power in State v. Nossaman, 107 Kan. 715, 193 P. 347, 20 A.L.R. 921, writ of error dismissed in 258 U. S. 633, 66 L. ed. 802, 42 S. Ct. 314. The statute in question, however, has been supplanted and repealed by a later law which merely prohibits the sale of cigarettes to minors (Laws 1927, chap. 172). The 1927 statute is discussed in Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100. In this later case, however, the court points out that "it must be conceded that it is competent and within the power of the legislature to regulate and even prohibit the sale of cigarettes within the state."

16 Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Zion v. Behrens, 262 Ill. 510, 104 N. E. 836, 51 L.R.A.(N.S.) 562, Ann. Cas. 1915A, 1057; State v. Lowry, 166 Ind. 372, 77 N. E. 728, 4 L.R.A.(N.S.) 528, 9 Ann. Cas. 350; Hershberg v. Barbourville, 142 Ky. 60, 133 S. W. 985, 34 L.R.A.(N.S.) 141, Ann. Cas. 1912D, 189.

Annotation: 20 A.L.R. 928, 931; 51 L.R.A.(N.S.) 562; Ann. Cas. 1912D, 191.

A city cannot prohibit using or carrying tobacco on any of the streets or parks or in any of the public buildings of a municipality, where the streets are so wide and the parks are so large that the use of tobacco therein could not offend others. Zion v. Behrens, 262 Ill. 510, 104 N. E. 836, 51 L.R.A.(N.S.) 562, Ann. Cas. 1915A, 1057. Annotation: 20 A.L.R. 932.

The state may undoubtedly prohibit smoking in some public places, such as theaters and street cars. State v. Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388. Annotation: 20 A.L.R. 932; Ann. Cas. 1915A, 1058.

17 Minnesota ex rel. Whipple v. Martinson, 256 U. S. 41, 65 L. ed. 819, 41 S. Ct. 425; State v. Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; State Bd. of Pharmacy v. Matthews, 197 N. Y. 353, 90 N. E. 966, 26 L.R.A.(N.S.) 1013; State v. Buchanan, 29 Wash. 602, 70 P. 52, 92 Am. St. Rep. 930, 59 L.R.A. 342; Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

18 Pierce Oil Corp. v. Hope, 248 U. S. 498, 62 L. ed. 381, 39 S. Ct. 172.

business transactions in the nature of monopolistic contracts, thus prohibiting restraints of trade.[19]

G. Control of Businesses Affected with a Public Interest

§ 293. Generally.—With respect to the problem of the power of the state to regulate businesses from the standpoint of their relation to the general public, it is apparent that the cases are in agreement only as to broad generalities pertaining to the questions which may arise. As to what businesses may be regulated, from this standpoint, and the extent to which the regulation of a business or a particular class of businesses may validly go under the police power, the authorities have not been in perfect accord and have not followed an entirely consistent criterion.[20]

Subject to the basic limitation upon categorization of factual situations arising in individual cases that it is difficult, if even possible, to define, to delimit, and to classify exactly what is meant or included in the phrase "business affected with a public interest,"[1] a fundamental generalization may be drawn from the authorities that individuals or corporations engaged in occupations in which the public have an interest or use may be regulated under the police power.[2] The reasons for the adoption of this principle are largely historical and are derived from the common law. In 1670, Lord Chief Justice Hale, in his treatise De Portibus Maris, 1 Harg. L. Tr. 78, stated that "now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only." His statement has been adopted by the Supreme Court, and subsequently by state courts, in the phrase that "when private property is affected with a public interest, it ceases to be juris privati only."[3] Other reasons which underlie this doctrine, advanced in early cases, were that persons engaged in such occupations were in the exercise of a public franchise or special privileges not enjoyed by others not so engaged, that their business implied a trust and public duty, that the government had the power to see that this trust was not abused and that the duty imposed was properly performed.[4] All the authorities, including the recent cases, state that one who devotes his property to a use in which the public has an interest in effect grants to the public an interest in that use and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created.[5]

The tendency has been to extend rather than to limit the domain of the principle, and consequently it has been denuded of the limiting element which was originally supposed to beset it—that to justify regulation of a business, the business must have a monopolistic character.[6] Furthermore, it is now recognized that a business may be so far affected with a public interest as to permit legislative regulation, although no public trust is imposed upon the property and although the public may not have a legal right to demand and receive service;[7] the presence or absence of a requirement as to a license is

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19 See Monopolies, Combinations, and Restraints of Trade [Also 19 R. C. L. p. 99, § 70].

20 Most of the leading cases dealing with the problems presented in this section and those immediately following are carefully analyzed in the exhaustive studies prepared by Maurice Finkelstein, "From Munn v. Illinois to Tyson v. Banton, A Study in The Judicial Process," 27 Columbia L. Rev. 769, and by Breck v. McAllister, "Lord Hale and Business Affected with a Public Interest," 43 Harvard L. Rev. 759.

1 See infra, § 294.

2 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; O'Gorman & Young v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A.L.R. 1327; Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735, 42 S. Ct. 397, 23 A.L.R. 229; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 39 S. Ct. 117, 9 A.L.R. 1420; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 S. Ct. 47; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 177; Haddad v. State, 23 Ariz. 105, 201 P. 847, citing R. C. L.; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Blue Coach Lines v. Lewis, 220 Ky. 116, 294 S. W. 1080, citing R. C. L.; Reo Bus Lines Co. v. Southern Bus Line Co. 209 Ky. 40, 272 S. W. 18, citing R. C. L.; New Orleans v. Le Blanc, 139 La. 113, 71 So. 248, citing R. C. L.; Glidden Co. v. Retail Hardware Mut. F. Ins. Co. 181 Minn. 518, 233 N. W. 310, 77 A.L.R. 616, affirmed in 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; Cofman v. Osterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Ex parte Tindall, 102 Okla. 192, 220 P. 125, citing R. C. L.; Woodburn v. Public Serv. Commission, 82 Or. 114, 161 P. 391, L.R.A.1917C, 98, Ann. Cas. 1917E, 996; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; State ex rel. Stimson Timber Co. v. Kuykendall, 137 Wash. 602, 243 P. 834, 55 A.L.R. 954, affirmed in 275 U. S. 207, 72 L. ed. 241, 48 S. Ct. 41; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863; Madison v. Madison Gas & E. Co. 129 Wis. 249, 108 N. W. 65, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819.

Annotation: 62 Am. St. Rep. 289 et seq.

The regulation and control of business of a private nature are sustained by reference to the police power, and then only when the courts have been able to say that a business is, in character and extent of operation, such that it touches the whole people and affects their general welfare. State ex rel. Public Serv. Commission v. Spokane & I. E. R. Co. 89 Wash. 599, 154 P. 1110, L.R.A.1918C, 675.

See Public Utilities and Services and specific utility titles.

3 Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 43 P. 1028, 31 L.R.A. 828; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; Illinois C. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862.

4 German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460, affirmed in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389.

5 Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 P. 62, L.R.A.1918C, 849; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; Idaho Power & L. Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, 282; Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916; McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 73 A. 80, 414, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460, affirmed in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Celina & M. County Teleph. Co. v. Union-Center Mut. Teleph. Asso. 102 Ohio St. 487, 133 N. E. 540, 21 A.L.R. 1145; Woodburn v. Public Serv. Commission, 82 Or. 114, 161 P. 391, L.R.A. 1917C, 98, Ann. Cas. 1917E, 996; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; State ex rel. Public Serv. Commission v. Spokane & I. E. R. Co. 89 Wash. 599, 154 P. 1110, L.R.A. 1918C, 675.

6 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.; State ex rel. Stimson Timber Co. v. Kuykendall, 137 Wash. 602, 243 P. 834, 55 A.L.R. 954, affirmed in 275 U. S. 207, 72 L. ed. 241, 48 S. Ct. 41.

Annotation: 62 Am. St. Rep. 289.

7 German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

immaterial.[8] Moreover, the right of control of businesses affected with a public use does not in any way depend on the existence of a reserved right of control incorporated in the charter granted to the corporation engaged therein.[9]

A person is not necessarily deprived of property without due process of law by statutes limiting the use and enjoyment of property, where the property is affected with a public use or is employed as an accessory in carrying on such business.[10] For example, railroad corporations hold their property and exercise their functions for the public benefit, and are therefore subject to legislative control; the legislature which has created them may regulate the mode in which they shall transact their business and the price which they shall charge for transportation of freight and passengers, and it may make all such regulations as are appropriate to protect the lives of persons carried upon railroads, or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved. It is fundamental that such legislation violates no contract, takes away no property, and interferes with no vested right.[11] The same general principles apply to common carriers generally[12] and many other forms of business.[13]

§ 294. Determination of Nature of Business.—The determination of what businesses are affected with a public interest is primarily for the legislature.[14] It must be considered, however, that in spite of the fact that it is entitled to great respect,[15] a mere declaration by the legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.[16] The matter is one which is always

[8] People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[9] Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[10] Burdick v. People, 149 Ill. 600, 36 N. E. 948, 24 L.R.A. 152, 41 Am. St. Rep. 329; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[11] Public Utilities Commission v. Springfield Terminal R. Co. 292 Ill. 505, 127 N. E. 128, citing R. C. L.; Range Sand Lime Brick Co. v. Great Northern R. Co. 137 Minn. 314, 163 N. W. 656, L.R.A.1918B, 784; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

[12] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236 (recognizing principle); Buffalo Fast Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 19 N. E. 63, 2 L.R.A. 384; Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

See CARRIERS, Vol. 9, p. 450, §§ 41 et seq.

[13] Murphy v. Phillips (Tex. Civ. App.) 63 S. W. (2d) 404 (appeal dismissed in 123 Tex. 408, 73 S. W. (2d) 92) citing R. C. L.

Public interest may extend to the use of lands. Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

See infra, § 295.

[14] Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 S. Ct. 72; Friedenburg v. Times Pub. Co. 170 La. 3, 127 So. 345, citing R. C. L.; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; State ex rel. Public Serv. Commission v. Spokane & I. E. R. Co. 89 Wash. 599, 154 P. 1110, L.R.A.1918C, 675.

[15] Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

[16] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

One does not devote his property or business to public use or clothe it with a public interest so as to subject it to public regulation of prices and wages merely because he makes commodities for and sells to the public in such callings as that of butcher, baker, tailor, or miner, and the mere legislative declaration that he does so is not so persuasive with the court that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

In People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556, it was

open to judicial inquiry.[17] Private business may not be regulated or converted into public business by legislative fiat.[18] The conversion by such a fiat declaring the owner to be a public carrier, of property used exclusively in the business of a private carrier, into a public utility, is an unconstitutional taking of private property for public use without compensation.[19] Furthermore, constitutional and statutory provisions declaring that every private corporation furnishing water to or for the public or which sells, rents, or delivers water to any person whatever, under contract or otherwise, is a public utility must be construed to apply only to corporations which have in fact devoted their property to public use.[20]

The meaning and extent of the phrase "affected with a public interest" have never been completely defined or consistently explained. In some recent cases, the Supreme Court has declared that the phrase is incapable of exact definition.[1] On earlier occasions, however, the court had attempted to envisage the scope of the phrase. According to Chief Justice Waite, "property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."[2] Chief Justice Taft subsequently declared that the expression "clothed with a public interest" means more than that the public welfare is affected by its continuity or by the price at which a commodity is sold or a service rendered. The circumstances must be such as to create a peculiarly close relationship between the public and those engaged in the business and raise implications of affirmative obligations on their part to be reasonable in dealing with the public.[3] The latest definition, by Mr. Justice Roberts, is by far the broadest adopted by the Supreme Court in any of the cases involving regulation of businesses. Mr. Justice Roberts stated that the phrase "affected with a public interest," as used in decisions upholding public regulation of businesses affected with a public interest, means only that an industry, for adequate reason, is subject to control for the public good.[4]

Attempts to classify judicially businesses affected with a public interest disclose a marked trend toward widening the boundaries in the later cases. Chief Justice Waite included in his definition the public conveniences enumerated by Lord Hale, as well as a few prevalent in his own time.[5] According

held that a legislative declaration that the price or charge for admission to a place of public amusement is a matter affected with a public interest within the police power was not conclusive upon the courts.

[17] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

[18] Hirsh v. Block, 50 App. D. C. 56, 267 F. 614, 11 A.L.R. 1238; Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 P. 62, L.R.A.1918C, 849; People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47.

[19] Frost v. Railroad Commission, 271 U. S. 583, 70 L. ed. 1101, 46 S. Ct. 605, 47 A.L.R. 457; Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445, 45 S. Ct. 191, 36 A.L.R. 1105.

[20] Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249, writ of certiorari denied in 249 U. S. 601, 63 L. ed. 797, 39 S. Ct. 259.

[1] Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A.L.R. 1327; Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236 (enumerating certain properties and kinds of business obviously included).

For a severe attack on the use of the phase "business affected with a public interest," and the effect of the phrase in limiting the exercise of the police power of the states in regulating certain types of business, see the dissenting opinions of Holmes, Stone, and Sanford, JJ., in Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

[2] Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

[3] Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

[4] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[5] See Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

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to Chief Justice Taft and cases following his viewpoint, businesses said to be clothed with a public interest were divided into three classes: (1) Those carried on under a public grant of privileges; (2d) certain occupations regarded as exceptional, such as the keeping of inns, cabs, and gristmills; and (3) businesses, the owners of which, by devoting them to public use, in effect grant the public an interest in that use and subject themselves to public regulation to the extent of that interest.[6] Mr. Justice Roberts's position is that there is no closed class or category of businesses affected with a public interest. The function of the courts under the Fifth and Fourteenth Amendments is to determine in each case whether, under the circumstances, the regulation is a reasonable exertion of governmental authority or whether it is arbitrary or discriminatory.[7] From such a steadily broadening attitude, it follows that the principle has been adopted that numerous subjects which formerly were chiefly private, with only an incidental public aspect, have become social subjects, demanding regulation of a kind and to an extent which former conditions did not warrant.[8] A business, by circumstances and by its nature, may rise from private to public concern and consequently be subject to governmental regulation.[9] Moreover, circumstances may so change in time or so differ in space as to clothe with a public interest great enough to justify regulation by law of a business which, at other times or in other places, would be a matter of purely private concern.[10]

The tests as to what businesses are affected with a public interest, due to the very nature of the problem, are not specific. In its most recent exhaustive treatment of the question, the Supreme Court has stated that such a phrase forms an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.[11] In some earlier decisions, however, the Supreme Court laid down some criteria. It stated that a business is not affected with a public interest merely because it is large, because the public are warranted in having a feeling of concern with respect to its maintenance,[12] or because of the mere fact that the public derives benefit, accommodation, ease, or enjoyment from the maintenance or operation of the business, and that while the word "interest" as here used has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.[13] Under the rule of such cases, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public. This may be "a grant by government or because there has arisen what may be termed a constructive grant of the use to the public."[14] The

[6] Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

[7] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[8] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254.

[9] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189.

[10] Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

[11] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[12] Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

[13] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

[14] Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Tyson & Bro.-United Theatre Ticket

rule has also been applied to situations in which a business has been conducted in such a manner that the public and all persons dealing in the products concerned have adapted themselves and their businesses to the methods used, so that they have become necessary to the safe and successful transaction of business, or where, from the nature of the business, in its regular course, the person carrying it on was necessarily intrusted with the property or money of his customers.[15] Although some of the cases in which a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business acted under a franchise or cases affecting trade and commerce, where there has been a virtual monopoly of means of transportation or methods of commerce, these criteria are relatively unimportant.[16] The doctrine of public interest in so far as state control is concerned does not apply, however, to any business which constitutes a part of the commerce between the states or with foreign nations; or, more accurately speaking, whatever authority exists as to the regulation of such business rests in, and must be exercised by, Congress alone.[17]

§ 295. Specific Applications of Rule.—Besides carriers generally, and particular types of carriers such as railroads,[18] there are very many forms of business enterprise which have been held to be impressed with a public interest. These are of many types besides the public utilities usually considered as making up this class of enterprise,[19] in which is included the business of supplying gas,[20] water,[1] or steam heat[2] to meet the demands of the inhabitants of a community. A few examples of such businesses other than utilities as such are: Innkeeping;[3] the operation of canals,[4] mills,[5] and cotton gins;[6] the

Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Chickasha Cotton Oil Co. v. Cotton County Gin Co. (C. C. A. 10th) 40 F. (2d) 846, 74 A.L.R. 1070.

Use by the public generally of each specified thing affected by an enactment cannot be made the test of public interest. Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458, 16 A.L.R. 165.

[15] People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.

[16] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A. 1915C, 1189; State v. Martyn, 82 Neb. 225, 117 N. W. 719, 23 L.R.A.(N.S.) 217, 17 Ann. Cas. 659; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

"The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state. . . . Nor is it the enjoyment of a monopoly." Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[17] Annotation: 62 Am. St. Rep. 297.

[18] See supra, § 293.

[19] See PUBLIC UTILITIES AND SERVICES and specific titles.

[20] Madison v. Madison Gas & E. Co. 129 Wis. 249, 108 N. W. 85, 8 L.R.A.(N.S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819.
See GAS COMPANIES [Also GAS, 12 R. C. L. p. 883, § 23].

[1] Annotation: 62 Am. St. Rep. 290.
See generally WATERWORKS [Also 27 R. C. L. p. 1386, §§ 4 et seq.].

[2] Law v. Railroad Commission, 184 Cal. 737, 195 P. 423, 14 A.L.R. 249.

[3] Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236 (recognizing rule); Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 637; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512.
Annotation: Ann. Cas. 1912B, 827.
As to license requirements and health regulations pertaining to inns and hotels, see INNKEEPERS [Also 14 R. C. L. p. 495, §§ 4, 5].

[4] White v. Farmers High Line Canal & Reservoir Co. 22 Colo. 191, 43 P. 1021, 31 L.R.A. 828.
See CANALS, Vol. 9, p. 317, §§ 2 et seq.

[5] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371 (approving rule); State v. Edwards, 86 Me. 102, 29 A. 947, 25 L.R.A. 504, 41 Am. St. Rep. 528.

[6] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371 (approving rule); Oklahoma Corp. Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945, 50 S. Ct. 397 (apparently accepting rule); Chickasha Cotton Oil Co. v. Cotton County Gin Co. (C. C. A. 10th) 40 F. (2d) 846, 74 A.L.R. 1070; Sims v. State, 80 Okla. 254, 196 P. 132, 23 A.L.R. 1475.
Annotation: 23 A.L.R. 1478 et seq., s. 74 A.L.R. 1079.

business of receiving, weighing, inspecting, and storing grain for others, in elevators or warehouses;[7] the operation of tobacco warehouses;[8] the business of operating a board of trade or exchange;[9] the stockyard business;[10] the insurance business;[11] the banking business;[12] and various other forms of business.[13]

Occupations held not to be in the class of those affected with a public use include enterprises such as those of a press association which has no exclusive or peculiar facilities for the gathering of news, on the questionable reasoning that it has numerous competitors in the business and has been granted no special or exclusive right or privilege by the state.[14] Newspapers are also held to be not generally affected with a public interest, so as to stand on a less favorable ground with respect to statutory regulation than ordinary persons.[15] The resale of theater tickets has been held not to be so impressed;[16] and a similar negative result has been reached as to the regulation of rates chargeable by an employment agency.[17] The business of mining coal has also been held to be one not affected by a public interest,[18] since the public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood or of domestic animals or to those owning any of the

7 Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 14 S. Ct. 857; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; State Pub. Utilities Commission v. Monarch Refrigerating Co. 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528; Ratcliff v. Wichita Union Stockyards Co. 74 Kan. 1, 86 P. 150, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016; Vega S. S. Co. v. Consolidated Elevator Co. 75 Minn. 308, 77 N. W. 973, 43 L.R.A. 843, 74 Am. St. Rep. 484; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 38 L.R.A. 672, 64 Am. St. Rep. 482; Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857.

For details as to regulation, see WAREHOUSES [Also 27 R. C. L. p. 958, §§ 13 et seq.].

8 Townsend v. Yeomans, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842.

9 Board of Trade v. Olsen, 262 U. S. 1, 67 L. ed. 839, 43 S. Ct. 470; Hill v. Wallace, 259 U. S. 44, 66 L. ed. 822, 42 S. Ct. 453; New York & C. Grain & Stock Exch. v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L.R.A. 411, 11 Am. St. Rep. 107; Farmers' Co-op. Commission Co. v. Wichita Bd. of Trade, 121 Kan. 348, 246 P. 511, 54 A.L.R. 295 (writ of error dismissed in 275 U. S. 574, 72 L. ed. 433, 48 S. Ct. 17); Ratcliff v. Wichita Union Stockyards Co. 74 Kan. 1, 86 P. 150, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016 (recognizing rule).

See generally EXCHANGES [Also 10 R. C. L. Perm. Supp. p. 2845].

10 Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735, 42 S. Ct. 397, 23 A.L.R. 229; Ratcliff v. Wichita Union Stockyards Co. 74 Kan. 1, 86 P. 150, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016.

Annotation: 10 Ann. Cas. 1022.

11 Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392; O'Gorman & Young v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163; Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U. S. 126, 69 L. ed. 538, 45 S. Ct. 320; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Employers Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320, 107 A.L.R. 1413; People ex rel. American Bankers' Ins. Co. v. Palmer, 363 Ill. 499, 2 N. E. (2d) 728, 106 A.L.R. 447; Glidden Co. v. Retail Hardware Mut. F. Ins. Co. 181 Minn. 518, 233 N. W. 310, 77 A.L.R. 616, affirmed in 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Boston Ice Co. v. Boston & M. R. Co. 77 N. H. 6, 86 A. 356, 45 L.R.A.(N.S.) 835, Ann. Cas. 1914A, 1090; McCarter v. Firemen's Ins. Co. 74 N. J. Eq. 372, 73 A. 80, 29 L.R.A. (N.S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048; State ex rel. Linde v. Taylor, 33 N. D. 76, 156 N. W. 561, L.R.A.1918B, 156, Ann. Cas. 1918A, 583, writ of error dismissed in 245 U. S. 627, 62 L. ed. 518, 38 S. Ct. 60; Insurance Co. of N. A. v. Welch, 49 Okla. 620, 154 P. 48, Ann. Cas. 1918E, 471; O'Neil v. American F. Ins. Co. 166 Pa. 72, 30 A. 943, 26 L.R.A. 715, 45 Am. St. Rep. 650; Com. v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L.R.A. 250, 44 Am. St. Rep. 603.

For details as to the regulation of the various types of insurance, see INSURANCE [Also 14 R. C. L. p. 857, §§ 25 et seq.; p. 869, § 42].

12 See BANKS, Vol. 7, p. 30, §§ 9 et seq.

13 Annotation: 6 L.R.A.(N.S.) 834 et seq.; 62 Am. St. Rep. 290, 291.

14 State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368.

15 Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1.

16 Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

17 Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A.L.R. 1327.

18 Cleveland, C. C. & St. L. R. Co. v. Commerce Commission, 315 Ill. 461, 146 N. E. 606, 54 A.L.R. 45; Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. St. Rep. 869; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A.(N.S.) 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

other ordinary necessaries or conveniences of life which form a part of the commerce of the country.[19] In at least one jurisdiction, however, a contrary position has been maintained by the state court as to coal mining.[20] The Supreme Court has indicated that the mere sale of commodities to the public by a butcher, baker, tailor, miner, or grocer is not sufficient to clothe such a business with a public interest so as to justify legislative price fixing.[1] Thus, the Supreme Court has held that dealing in gasoline[2] and ice[3] is not affected with a public interest, although some of the state courts have indicated a contrary position both as to petroleum products[4] and as to ice.[5] The most recent pronouncement of the Supreme Court indicates, however, that it may have receded from its former position as to the sale of commodities. In its most recent decision the court indicated that price fixing is not based entirely, if at all, upon the concept of a business having to be "affected with a public interest" to be subject to such regulation, but rather is based upon the concept of an industry as subject, for adequate reasons, to control for the public good.[6]

§ 296. Nature of Control.—Whenever a business is affected with a public use or is generally of such a nature as to be subject to regulation as stated in the immediately foregoing sections, it becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression.[7] In general, the legislature may make all such reasonable regulations as it may deem necessary for the protection of the public in its relations with those who carry on a business affected with a public interest.[8] It may interfere whenever the public interests demand such interference, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.[9]

No principle is better established than the one that when an owner devotes private property to the public use, he so devotes it bound with notice that

19 People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.

20 State ex rel. Hopkins v. Howat, 109 Kan. 376, 198 P. 686, 25 A.L.R. 1210, writ of error dismissed in 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

1 New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A.L.R. 1327; Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

2 Williams v. Standard Oil Co. 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A.L.R. 596.

3 New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371.

4 Miller v. People, 76 Colo. 157, 230 P. 603, 39 A.L.R. 269.

5 Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018.

Annotation: 68 A.L.R. 1033.

6 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

As to price fixing in private business, see supra, § 282.

7 Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 S. Ct. 47.

Annotation: 33 L.R.A. 177.

8 German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 38 L.R.A. 672, 64 Am. St. Rep. 482; Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460, affirmed in effect in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468; Ex parte Tindall, 102 Okla. 192, 229 P. 125, citing R. C. L.; Central Oregon Irrig. Co. v. Public Serv. Commission, 101 Or. 442, 196 P. 832, 15 A.L.R. 1216.

Annotation: 33 L.R.A. 178; 62 Am. St. Rep. 290; 1 Ann. Cas. 433.

9 Chicago v. O'Connell, 278 Ill. 591, 116 N. E. 210, 8 A.L.R. 916.

For the general rule as to legislative discretion in the exercise of the police power, see infra, § 305.

it will be subject to public regulation both as to its use and as to the compensation to be paid for it.[10] For example, the state may, in a case relating to a public warehouse, fix the maximum of charges for the storage of grain therein or in elevators.[11] Acting under the same principle, statutes have been upheld which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph, and other companies; hackmen, warehousemen, owners of water mills, etc.[12] The right of the public to regulate a business devoted to public use does not extend, however, to the enforcing of its continuity as attempted by the Kansas Industrial Court Act. One whose business, by merely changed conditions, has become clothed with a public interest may discontinue it at will, whether it is profitable or not.[13]

The fact that a particular business may or may not fall within the class of businesses such as utilities or insurance does not negative the right of the state to exercise its police power within proper limits in reference to such a business. Thus, while the business of mining may not be affected with a public interest, the legislature may enact laws adapted to the promotion of the health and safety of men working in underground mines.[14]

H. Police Regulations Imposing Burdens, Expenses, and Liabilities

1. In General

§ 297. Generally.—It is an established rule that laws are not rendered unconstitutional by reason of their imposing burdens on persons or property,[15] since the right to impose such burdens is an essential quality or incident of the police power.[16] Hence, owners of property may be required to meet the expenses of an inspection thereof, to provide essential sanitary measures,[17] and generally to assume all kinds of restraints and burdens in order to secure the

[10] Mapleton v. Iowa Pub. Serv. Co. 209 Iowa, 400, 223 N. W. 476, 68 A.L.R. 993; State v. Norval Hotel Co. 103 Ohio St. 361, 133 N. E. 75, 19 A.L.R. 367.

[11] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

[12] Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 915, 48 S. Ct. 545, 56 A.L.R. 1327; Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236; Logansport v. Public Serv. Commission, 202 Ind. 523, 177 N. E. 249, 76 A.L.R. 838; Victoria v. Victoria Ice, Light & P. Co. 134 Va. 134, 114 S. E. 92, 28 A.L.R. 562; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

For a discussion of the regulation and the fixing of rates or charges for public utilities, see Public Utilities and Services.

[13] Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

"The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct, and is assumed when the business is entered upon." Ibid.

[14] State v. Holden (Holden v. Hardy) 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383. See Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.

[15] Indiana R. Co. v. Calvert, 168 Ind. 321, 80 N. E. 961, 10 L.R.A.(N.S.) 780, 11 Ann. Cas. 635; Jay Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N. W. 383, 26 A.L.R. 24; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579.

A statute may be valid under the police power although it burdens honest business where it burdens such business only that, under its forms, dishonest business may not be done. Merrick v. N. W. Halsey & Co. 242 U. S. 568, 61 L. ed. 498, 37 S. Ct. 227.

[16] Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. St. Rep. 400; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512.

If the designation by the Milk Control Board of minimum prices for milk is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be an act of tyranny. Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7.

[17] California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100.

Annotation: 16 L.R.A. 380.

general comfort and safeguard the public health.[18] The value of the property, however, and the amount of the expense required in order to comply with police regulations should be taken into consideration in estimating the reasonableness of a statute enacted under the police power,[19] for the unreasonable imposition of expenses or duties without compensation may render a statute unconstitutional. For example, while a statute requiring physicians and midwives attending at births to report to the proper authorities the mere fact of the births may be constitutional, still a statute requiring them to investigate and to notify as to facts not necessarily or naturally coming within the knowledge of the attending physician or midwife is unconstitutional as requiring such physician or midwife to search out nonprofessional information without compensation and as being not a valid exercise of the police power, because it is unnecessary, unreasonable, and arbitrary.[20]

Questions as to the reasonableness of a regulation enacted in the exercise of the police power which imposes both a burden and an expense may be raised together with the allied problem as to whether it amounts to a denial of due process of law. While statutes enacted within the proper scope of the police power constitute due process of law,[1] due process clauses are not intended to limit the right of the state to exercise the police power properly in the advancement of the public safety.[2] For example, the fact that a railroad company, in order to equip its engines with headlights required by statute, may be forced to do away with the reflectors and lights which it has in use has been held to be only incidental to a compliance with a police regulation requiring such change; accordingly, such statute would not be in violation of constitutional requirement as to due process of law.[3]

Apart from laws and regulations established for the health of the community, there are varied instances in which parties are compelled to perform acts and to bear certain expenses where the public is interested in the acts which are performed as much as the parties themselves. Thus, in opening, widening, or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done may be chiefly for the benefit of the public.[4]

[18] California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Territory ex rel. McMahon v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L.R.A. 355; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; State v. Durein, 70 Kan. 1, 78 P. 152, 80 P. 987, 15 L.R.A.(N.S.) 908, affirmed by 208 U. S. 613, 52 L. ed. 645, 28 S. Ct. 567; State v. Canal & C. R. Co. 50 La. Ann. 1189, 24 So. 265, 56 L.R.A. 287, writ of error dismissed in (U. S.) 44 L. ed. 1221, 20 S. Ct. 1027; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L.R.A. 783; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. St. Rep. 637.

See also supra, § 266; infra, § 298.

[19] Missouri P. R. Co. v. Norwood, 283 U. S. 249, 75 L. ed. 1010, 51 S. Ct. 458; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L.R.A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed in 203 U. S. 583, 51 L. ed. 328, 27 S. Ct. 781.

The expense of complying with police regulations must be reasonable when considered in connection with the surrounding facts. Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706.

[20] State v. Boone, 84 Ohio St. 346, 95 Ohio St. 300, 95 N. E. 924, 97 N. E. 978, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683.

Annotation: Ann. Cas. 1912C, 686.

[1] See supra, § 262; infra, Vol. 12, Subd. XIV.

[2] See supra, § 262.

[3] Stephens v. Central of Georgia R. Co 138 Ga. 625, 75 S. E. 1041, 42 L.R.A.(N.S.) 541, Ann. Cas. 1913E, 609.

[4] Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 S. Ct. 255.

Special burdens are often necessary for general benefits for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Hill v.

If under all the circumstances the expenditure required is unreasonable, the law may amount to a deprivation of property without due process of law.[5]

2. Burdens on Corporations

§ 298. Generally.—While a corporation as an artificial person is not entitled to the privileges and immunities of citizenship,[6] it must nevertheless be borne in mind that the validity of police regulations devolving expenses on corporations may violate the constitutional provisions as to the equal protection of the laws.[7]

The charter of a corporation is frequently subject to an expressly reserved right on the part of the state to make changes or modifications therein. Under such a reserved power statutes may be passed amounting in their practical effect to police regulations, and such statutes may be upheld under this reserved power of amendment although such laws would not be valid as applied to private individuals. But where no such right to change the charter of a corporation has been reserved, a question may arise as to whether a particular statute, by reason of the expense which it imposes on a corporation, does or does not impair the obligation of the contract entered into between it and the state.[8]

As a general rule, the state and those acting under its authority have the right to require a corporation to incur expenses in order properly to exercise its rights and to use its property and franchises with due regard to the public needs.[9] The element of expense may always be considered, but the weight to be given that fact depends somewhat on the character of the facilities sought. If the matter involves the use of property needed in the discharge of those duties which a carrier is bound to perform, then on proof of the necessity, the changes may be required although the furnishing of such necessary facilities may occasion an incidental pecuniary loss.[10] The fact that an order requiring a railroad corporation to operate a certain train may occasion a pecuniary loss so far as that particular train is concerned does not render the order in violation of the Constitution of the United States as a taking of property without due process of law or a denial of the equal protection of the laws. In such a case the courts have said that the duty of the railroad company to furnish necessary facilities is coterminous with the powers of

Rae, 52 Mont. 378, 158 P. 826, L.R.A.1917A, 495, Ann. Cas. 1917E, 210.

[5] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579.

The imposition upon particular individuals of the cost of advancing the public convenience must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486.

See also infra, Vol. 12, Subd. XIV.

[6] See Vol. 12, Subd. XII.

[7] See infra, Vol. 12, Subd. XIII.

[8] **The reserved right of a state to amend corporate charters cannot be used** in the exercise of the police power as grounds for taking the property of a corporation without due process of law. Chicago, M. & St P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, 35 S. Ct. 869, L.R.A.1916A, 1133.

See infra, Vol. 12, Subd. XI.

[9] Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. 367; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 S. Ct. 518.

As a means of protecting the public the state may require that a police officer be carried upon every car or instead it may secure the presence of the police upon the cars by a statutory provision that the police officer shall be carried free of charge when in uniform. "In any case the transportation of the officer is a subordinate incident to the police regulation, and of the power of the legislature to enact such a regulation there would seem to be neither room for doubt nor ground for denial." State v. Sutton, 87 N. J. L. 192, 94 A. 788, L.R.A.1917E, 1176, Ann. Cas. 1917C, 91.

[10] Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 519, 74 N. W. 893, 40 L.R.A. 389, 70 Am. St. Rep. 358, affirmed in 179 U. S. 287, 45 L. ed. 194, 21 S. Ct. 115.

the corporation and that the obligation to discharge that duty must be considered in connection with the corporate business as a whole, with the character of the service required, and the need for its performance.[11] Where a railroad company has been chartered for the purpose of transporting freight and passengers, so long as it continues to exercise its rights under such charter and does not elect to surrender its franchise, it seems clearly established that the performance of the duty for which it was called into existence may be enforced, even though such performance may entail a pecuniary loss. Whenever a railroad company is called upon to perform an absolute duty, the question of expense is not to be considered; but when the duty sought to be enforced is only an incident to the main duty, the question of expense is to be taken into consideration in connection with the public necessities.[12] Further illustrations of the application to corporations of the general rule stated appear in the succeeding section.[13]

§ 299. Illustrations of Burdensome Regulations on Corporations.—It is clear that quite apart from any provisions in their charters the police power of the state extends to requiring railroad corporations to do numerous things involving more or less expense.[14] Accordingly, it has been held that a railroad, without any compensation or right to damages, may be compelled to fence its tracks;[15] to construct farm crossings for the use of the owners of adjoining land;[16] to abolish,[17] reconstruct, or relocate[18] grade crossings; to erect and maintain cattle guards on demand by the owner of land through which its road passes where such guards are necessary to prevent the wandering of stock;[19] to construct and maintain at grade crossings all such safety devices as may be reasonably necessary for the protection of the traveling public;[20]

[11] Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 S. Ct. 330; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 S. Ct. 585, 11 Ann. Cas. 398.

A carrier may be required, even at a financial loss, to carry passengers over a line previously devoted to freight service, where the franchise of the railroad provided that the line should be a public highway and "free to all persons for the transportation of their persons and property," subject to the payment of the lawful charges for such transportation. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. Chesapeake & O. R. Co. v. Public Serv. Commission, 242 U. S. 603, 61 L. ed. 520, 37 S. Ct. 234.

[12] Seward v. Denver & R. G. R. Co. 17 N. M. 557, 131 P. 980, 46 L.R.A.(N.S.) 242.

[13] See infra, § 299.

[14] Great Northern R. Co. v. Minnesota, 246 U. S. 434, 62 L. ed. 817, 38 S. Ct. 346; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; Chicago & N. W. R. Co. v. Illinois Commerce Commission, 326 Ill. 625, 158 N. E. 376, 55 A.L.R. 654; State ex rel. Clara City v. Great Northern R. Co. 130 Minn. 480, 153 N. W. 879, L.R.A.1918D, 1153, affirmed in 246 U. S. 434, 62 L. ed. 817, 38 S. Ct. 346.

Annotation, 104 Am. St. Rep. 644.

[15] Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Greer v. Downey, 8 Ariz. 164, 71 P. 900, 61 L.R.A. 408.

Annotation: 31 L.R.A.(N.S.) 861.

[16] Illinois C. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862.

[17] Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 73 L. ed. 161, 49 S. Ct. 69, 62 A.L.R. 805; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 S. Ct. 437; State ex rel. Wabash R. Co. v. Public Serv. Commission, — Mo. —, 100 S. W. (2d) 522, 109 A.L.R. 754 (recognizing rule); Durham v. Southern R. Co. 185 N. C. 240, 117 S. E. 17, 35 A.L.R. 1313, affirmed in 266 U. S. 178, 69 L. ed. 231, 45 S. Ct. 51; Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L.R.A. 850.

Annotation: 55 A.L.R. 660, s. 62 A.L.R. 816, and 109 A.L.R. 769; 70 L.R.A. 850.

The state may empower cities to enact ordinances abolishing grade crossings. Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915A, 65.

See Railroads [Also 22 R. C. L. p. 787, § 42].

[18] Chicago & N. W. R. Co. v. Illinois Commerce Commission, 326 Ill. 625, 158 N. E. 376, 55 A.L.R. 654.

Annotation: 55 A.L.R. 660, s. 62 A.L.R. 816, and 109 A.L.R. 769.

[19] Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92; Yazoo & M. Valley R. Co. v. Harrington, 85 Miss. 366, 37 So. 1016, 3 Ann. Cas. 181.

Annotation: 31 L.R.A.(N.S.) 861; 3 Ann. Cas. 182.

[20] Great Northern R. Co. v. Minnesota,

to stop its trains at particular stations;[1] to construct switches, sidetracks, and connections to enable it to transport cars to and from other lines;[2] and to construct lateral lines so as to reach adjacent properties.[3] On the same general principles as to expense, it has been decided that the fact that the equipment of street cars with air brakes will require a large outlay of money is not necessarily sufficient to nullify the ordinance requiring it.[4] As an illustration of another character, the Supreme Court of the United States has decided that a state statute requiring corporations to produce books and papers in court and providing no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country in collecting and sending the documents to the state demanding them does not operate, in this respect, to take property for public use without compensation where a certain amount of compensation is allowed by the general law of the state.[5]

Circumstances may arise and conditions may exist which would render the exercise of police power in instances similar to those cited an unreasonable and unwarranted violation of the rights of property.[6] The right of the state to regulate public carriers does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation.[7] The demands upon a carrier which lawfully may be made are limited by its duty.[8] Railroad companies may not, consistently with due process of law, be compelled by a state administrative order or law to install scales for shippers.[9] Furthermore, it has been held that a railroad company cannot be compelled to erect and maintain crossings at its own expense for persons whose residences are cut off by the railroad from a public highway, where no statute requiring it to make such crossings existed at the time of the construction of the road;[10] that it cannot under penalty of a heavy fine for refusal be required, without a preliminary hearing, to construct and maintain lateral tracks necessary to reach grain elevators which may be erected adjacent to the right of way;[11] and that the attempt by the state to compel

246 U. S. 434, 62 L. ed. 817, 38 S. Ct. 346; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 698; Sabre v. Rutland R. Co. 86 Vt. 347, 85 A. 693, Ann. Cas. 1915C, 1269.

[1] Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 S. Ct. 585, 11 Ann. Cas. 398.

[2] Seaboard Air Line R. Co. v. Railroad Commission, 240 U. S. 324, 60 L. ed. 669, 36 S. Ct. 260; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 52 L. ed. 863, 32 S. Ct. 535; Atlantic, S. River & G. R. Co. v. State, 42 Fla. 358, 29 So. 319, 89 Am. St. Rep. 233.

[3] State ex rel. Mt. Hope Coal Co. v. White Oak R. Co. 65 W. Va. 15, 64 S. E. 630, 28 L.R.A.(N.S.) 1013.
Annotation: 28 L.R.A.(N.S.) 1013.

[4] People v. Detroit United R. Co. 134 Mich. 682, 97 N. W. 36, 63 L.R.A. 746, 104 Am. St. Rep. 626.

[5] Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 S. Ct. 178, 12 Ann. Cas. 658.

[6] See supra, §§ 260, 268, 269; infra, Vol. 12, Subd. XIV.

[7] Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, 35 S. Ct. 869, L.R.A.1916A, 1133.

[8] Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, 35 S. Ct. 753.

[9] Great Northern R. Co. v. Cahill, 253 U. S. 71, 64 L. ed. 787, 40 S. Ct. 457, 10 A.L.R. 1335; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, 35 S. Ct. 753.

[10] People v. Detroit, G. H. & M. R. Co 79 Mich. 471, 44 N. W. 934, 7 L.R.A. 717.

[11] Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 S. Ct. 461, 18 Ann. Cas. 989.

The places and persons interested, the volume of business to be affected, and the saving in time and expense to the shipper, as against the cost and loss to the carrier, must be considered in determining the reasonableness of, and the public necessity for, an order of a state railroad commission requiring trackage connections at certain points between competing railway companies for the interchange of business, which is attacked as taking property without due process of law. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535.

a railroad company to construct and operate a spur track to a private mill may be void, as a taking of property for private use without due process of law.[12] It has also been held that a statute making railroad companies liable for all expenses of the coroner and his inquest and the burial of all persons who may die on the cars or who may be killed by collision or other accident occurring to such cars or otherwise is unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law or been guilty of no negligence, since such act amounts to the taking of property without due process of law.[13] For the same reason, a statute requiring the interchange of cars over connecting tracks between lines of railroads crossing each other may amount to a taking of property without due process of law, and hence such interchange cannot be required where there is no adequate protection from loss or undue detention of cars or provision for securing due compensation for their use.[14] Moreover, the legislature cannot shift the financial burden of relocating a highway over a railroad track from the state to the railroad company.[15]

3. Liability Imposed

§ 300. Extent.—Closely allied to the inquiry as to whether the state in the exercise of its police power may impose expenses and burdens without infringing the constitutional guaranty as to due process of law[16] is the question as to the extent to which liability may be imposed for injuries to persons or property due to negligent failure to comply with a police regulation or for all consequences irrespective of negligence.[17] The immunity from liability for negligence of either oneself or one's agents and servants is not a constitutional right,[18] and it may be taken away without deprivation of due process of law. Thus, statutes authorizing recovery against telegraph companies for mental anguish resulting directly or proximately from, or occasioned by, the failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering messages have been upheld and are not usually considered invalid as depriving such companies of property without due process of law.[19] In some jurisdictions statutes making an employer liable for injuries to or death of an employee caused by the negligence of a coemployee, in the same manner and to the same extent as if the negligence causing the injury or death was that of the employer, have been upheld as appropriate police regulations and as not depriving the employer of his property without due process of law. In other words, for the purpose of providing for the safety and protection of employees in the service of a common employer, the legislature in these jurisdictions has authority to abrogate the exception to the general rule of respondeat superior in favor of the employer and make him liable to one of his employees for damages caused by the negligence of another employee, while acting within the scope

[12] Northern P. R. Co. v. Washington R. Commission, 58 Wash. 360, 108 P. 938, 28 L.R.A.(N.S.) 1021.

[13] Ohio & M. R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259.

[14] Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 S. Ct. 246.

[15] Chicago & N. W. R. Co. v. Illinois Commerce Commission, 326 Ill. 625, 158 N. E. 376, 55 A.L.R. 654.

[16] See supra, § 297.

[17] As to imposition of liability without fault, see infra, § 301.

[18] Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313, 10 Ann. Cas. 1108.

[19] Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 S. Ct. 934; Simmons v. Western U. Teleg. Co. 63 S. C. 425, 41 S. E. 521, 57 L.R.A. 607; Nitka v. Western U. Teleg. Co. 149 Wis. 106, 135 N. W. 492, 49 L.R.A.(N.S.) 337, Ann. Cas. 1913C, 863.
Annotation: 49 L.R.A.(N.S.) 337.

of his employment, regardless of the fact that such employees are fellow servants.[20] On the other hand, it was once held that an attempt to make an employer liable for injury to an employee, arising out of a necessary risk or danger of the employment or one inherent in the nature thereof, without fault on the part of the employer, unless it was caused by the serious and wilful misconduct of the employee, was an unconstitutional taking of liberty and property without due process of law.[1]

§ 301. Liability with or without Fault.—It may be laid down as a general proposition that absolute liability, without fault, cannot ordinarily be imposed upon a citizen. Under this principle it has been held in several jurisdictions that a statute making a railroad company liable for stock killed whether the company was negligent or not and fixing the damages according to a schedule, deprives the company of property without due process of law, especially where the railroad company is not bound by its charter or principles of the common law to fence its road for the protection of other persons' domestic animals. Such a statute, it is said, cannot be sustained in itself as a valid police regulation.[2] Circumstances may exist, however, which impel legislative action. In such a case the rule is recognized that behind and above the general principles of the law that there is no individual liability for an act which ordinary human care and foresight could not guard against and that a loss from any cause purely accidental must rest where it chances to fall, there lies the legislative power which, in the absence of organic restraint, may for the general welfare of society impose obligations and responsibilities otherwise nonexistent.[3] Moreover, where there are other statutes enacted under the police power compelling railroad corporations to inclose their roads with fences having gates at crossings and cattle guards, the failure to erect and maintain them in the face of the law may amount to negligence, and if injuries to property occur in consequence, statutory liability for damages may then be properly imposed.[4] It has also been held that a statute making a railroad liable in double damages for stock killed in consequence of its neglect to erect a fence is constitutional.[5]

[20] Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313, 10 Ann. Cas. 1108; Victor Chemical Works v. Industrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Dirken v. Great Northern Paper Co. 110 Me. 374, 86 A. 320, Ann. Cas. 1914D, 396. See also Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 S. Ct. 606.

For general discussion of Employers' Liability Acts, see MASTER AND SERVANT [Also 18 R. C. L. p. 771, §§ 233 et seq.].

[1] Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156.

But see New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A.1917D, sustaining the validity of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), based upon a constitutional amendment, imposing liability on employers to make compensation for injuries received by employees.

Annotation: 34 L.R.A.(N.S.) 162.

[2] Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 13 So. 602, 27 L.R.A. 263, 46 Am. St. Rep. 92; Wadsworth v. Union P. R. Co. 18 Colo. 600, 33 P. 515, 23 L.R.A. 812, 36 Am. St. Rep. 309; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A. (N.S.) 699; Kelly v. Minneapolis, 57 Minn. 294, 59 N. W. 304, 26 L.R.A. 92, 47 Am. St. Rep. 605; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Jensen v. Union P. R. Co. 6 Utah, 253, 21 P. 994, 4 L.R.A. 724; Jolliffe v. Brown, 14 Wash. 155, 44 P. 149, 53 Am. St. Rep. 868; Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 23 P. 1008, 22 Am. St. Rep. 143.

Annotation: 4 L.R.A. 724; 25 L.R.A. 161; 35 L.R.A.(N.S.) 1018; 22 Am. St. Rep. 148.

[3] Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 S. Ct. 92, Ann. Cas. 1913B, 1349.

Annotation: 53 A.L.R. 875 et seq.

[4] Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 S. Ct. 207; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 S. Ct. 110; Engebretsen v. Gay, 158 Cal. 30, 109 P. 880, 28 L.R.A.(N.S.) 1062, Ann. Cas. 1912A, 690.

Annotation: 53 A.L.R. 879; Ann. Cas. 1912C, 703.

[5] Humes v. Missouri P. R. Co. 82 Mo. 221, 52 Am. Rep. 369.

In many cases legislation imposing liability where no fault or negligence existed has been sustained. The most common example is a statute making railroad corporations responsible in damages for property injured by fire communicated directly or indirectly by locomotive engines in use upon their roads, even where there is no proof of negligence[6] or fault on the part of the corporation.[7] Statutes have repeatedly been sustained imposing absolute liability for damages or injury resulting from the explosion of stored explosives,[8] and Workmen's Compensation Acts imposing liability without fault have been consistently upheld as a valid exercise of the police power.[9] Similarly, the state may impose the general liability of an insurer on railroad companies for all damages sustained by passengers while being transported over the road.[10] A statute imposing liability upon a municipal corporation for the damage committed by a riot or mob is valid. It rests upon the duty of the state to protect its citizens in the enjoyment and possession of their acquisitions and is but a recognition of the obligation of the state to preserve social order and secure the property of the citizen against the violence of a riot or mob.[11] The principle has also been applied where a corporation is given by statute an insurable interest in property exposed to danger from fire, that it may thereby protect itself against possible loss by fire caused without its fault.[12] The taking of the property of an initial carrier is not in violation of the Constitution, where it is taken to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of a loss, under a statute by which an interstate carrier voluntarily receiving property for transportation from a point in one state to a point in another state is made liable to the holder of the bill of lading for a loss anywhere en route; and this in spite of any agreement or stipulation to the contrary with a right of recovery over against the carrier actually causing the loss.[13]

I. Reasonableness of Police Regulations

§ 302. Generally.—The fixed rule and basic standard by which the validity of all exercise of the police power is tested is that the police power of the state

[6] St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 S. Ct. 243, affirming 121 Mo. 298, 24 S. W. 591, 25 L.R.A. 161; Union P. R. Co. v. De Busk, 12 Colo. 294, 20 P. 752, 3 L.R.A. 350, 13 Am. St. Rep. 221; Grissell v. Housatonic R. Co. 54 Conn. 447, 9 A. 137, 1 Am. St. Rep. 138; Pittsburgh, C. C. & St. L. R. Co. v. Chappell, 183 Ind. 147, 106 N. E. 403, Ann. Cas. 1918A, 627; Campbell v. Missouri P. R. Co. 121 Mo. 340, 25 S. W. 936, 25 L.R.A. 175, 42 Am. St. Rep. 530; Brown v. Carolina Midland R. Co. 67 S. C. 481, 46 S. E. 283, 100 Am. St. Rep. 756; Mobile Ins. Co. v. Columbia & G. R. Co. 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725.

Annotation: 53 A.L.R. 875; 25 L.R.A. 161; 44 Am. St. Rep. 731; 100 Am. St. Rep. 764.

No constitutional provision is violated by a statute making railroad companies answerable for loss of buildings on their rights of way through fire resulting from their negligence, notwithstanding stipulations to the contrary in existing contracts, since the enactment is within the police power of the state. Ætna Ins. Co. v. Chicago G. W. R. Co. 190 Iowa, 487, 180 N. W. 649, 16 A.L.R. 249. Annotation: 16 A.L.R. 254.

For detailed analysis of such statutes, see FIRES [Also 11 R. C. L. p. 978, §§ 33 et seq.].

[7] East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 6 L.R.A.(N.S.) 198, 7 Ann. Cas. 1015.

Annotation: 6 L.R.A.(N.S.) 198.

[8] See EXPLOSIONS AND EXPLOSIVES [Also 11 R. C. L. p. 658, §§ 9, 10].

[9] See WORKMEN'S COMPENSATION ACTS [Also 28 R. C. L. p. 741, §§ 36–44; p. 752, § 47].

[10] Chicago, R. I. & P. R. Co. v. Eaton, 183 U. S. 589, 46 L. ed. 341, 22 S. Ct. 228.

Annotation: 53 A.L.R. 881.

[11] Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 S. Ct. 92, Ann. Cas. 1913B, 1349.

Annotation: 13 A.L.R. 759.

As to due process in such cases, see Vol. 12, Subd. XIV.

[12] McCandless v. Richmond & D. R. Co. 38 S. C. 103, 16 S. E. 429, 18 L.R.A. 440.

[13] Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 S. Ct. 205; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7.

Annotation: 31 L.R.A.(N.S.) 7.

See CARRIERS, Vol. 9, p. 991, §§ 911 et seq.

extends only to such measures as are reasonable[14] and that all police regulations must be reasonable under all circumstances.[15] Too much significance cannot be given to the word "reasonable" in considering the scope of the police power in a constitutional sense,[16] for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights.[17] It has been said that the only limitation upon the exercise of the police power is that such exercise must be reasonable.[18] The validity of a police regulation therefore primarily depends on whether under all the existing circumstances the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.[19]

In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power.[20] A statute to be within this power must also be reasonable in its operation upon the persons whom it affects,[1] must not be for the annoyance of a particular class,[2] and must not be unduly oppressive.[3]

§ 303. Appropriateness of Means.—It is a general rule that in order for a police measure to be reasonable, the means adopted must be reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the power.[4] In order to sustain legislative interference by vir-

14 Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; Ex parte Hawthorne, 116 Fla. 608, 156 So. 619, 96 A.L.R. 572; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100; Wheeler v. Boston, 233 Mass. 275, 123 N. E. 684, 15 A.L.R. 275; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Davison v. Chicago & N. W. R. Co. 100 Neb. 462, 160 N. W. 877, L.R.A.1917C, 135; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179; People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Re Steube, 91 Ohio St. 135, 110 N. E. 250, L.R.A.1916E, 377; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; Austin v. Thomas, 96 W. Va. 628, 123 S. E. 590, 38 A.L.R. 1490; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

The validity of a police regulation must depend on the circumstances of each case and the character of the regulation as reasonable. People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120, 42 A.L.R. 651.

15 Missouri & N. A. R. Co. v. State, 92 Ark. 1, 121 S. W. 930, 31 L.R.A.(N.S.) 361, 135 Am. St. Rep. 164; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 14 Ann. Cas. 1080, 27 L.R.A.(N.S.) 260, affirmed in 216 U. S. 358, 54 L. ed. 515, 30 S. Ct. 301; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.(N.S.) 344, Ann. Cas. 1913A, 1247; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 108 N. W. 261, 2 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 S. Ct. 698; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; People v. Wilber, 198 N. Y. 1, 90 N. E. 1140, 27 L.R.A. (N.S.) 357, 19 Ann. Cas. 626; Cofman v. Ousterhous, 40 N. D. 390, 168 N W. 826, 18 A.L.R. 219; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

16 Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

17 Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

The test of a police regulation when measured by the due process clause of the Constitution is reasonableness as distinguished from arbitrary or capricious action. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

18 Denver v. Denver & R. G. R. Co. 63 Colo. 574, 167 P. 969, L.R.A.1918D, 659, affirmed in 250 U. S. 241, 63 L. ed. 958, 39 S. Ct. 450; Chicago v. Gunning System, 214 Ill. 628, 73 N. E. 1035, 70 L.R.A. 230, 2 Ann. Cas. 892.

19 Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Boise Asso. C. M. v. Ellis, 26 Idaho, 438, 144 P. 6, L.R.A.1915E, 917; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879. Ann. Cas. 1915B, 659; People v. Ringe, 197 N. Y. 143, 90 N. E. 451, 27 L.R.A.(N.S.) 528, 18 Ann. Cas. 474; State v. Bass, 171 N. C. 780, 87 S. E. 972, L.R.A.1916D, 583; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.

20 As to appropriateness of means, see infra, § 303.

1 East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; State v. Bass, 171 N. C. 780, 87 S. E. 972, L.R.A.1916D, 583; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Froelich v. Cleveland, 99 Ohio St. 376, 124 N. E. 212, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.

2 Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L.R.A. 432, writ of error dismissed in (U. S.) 45 L. ed. 1256, 21 S. Ct. 917.

3 Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452, affirmed in 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; Halter v. State, 74 Neb. 757, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Froelich v. Cleveland, 99 Ohio St. 376, 124 N. E. 212, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L.R.A. 432, writ of error dismissed in (U. S.) 45 L. ed. 1256, 21 S. Ct. 917; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; State v. Kreutzberg, 114 Wis. 530, 90 N. E. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

4 Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; People v. Witte, 315 Ill. 282, 146 N. E. 178, 37 A.L.R. 672; East Side Levee & Sanitary Dist. v. East St. Louis & C. R. Co. 279 Ill. 123, 116 N. E. 720, citing R. C. L.; People ex rel. Thrasher v. Smith, 275 Ill. 256, 114 N. E. 31, L.R.A. 1917B, 1075; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Friend v. Chi-

tue of the police power, either by a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to such objects,[5] or, for more specific examples, to the public welfare[6] or public health.[7] Moreover, the law must tend toward the accomplishment or promotion of such purposes

cago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A. (N.S.) 438, Ann. Cas. 1915A, 292; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918F, 542; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579; State v. Bass, 171 N. C. 780, 87 S. E. 972, L.R.A.1916D, 583; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Froelich v. Cleveland, 99 Ohio St. 376, 124 N. E. 212, citing R. C. L.; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; Mendiola v. Graham, 139 Or. 592, 10 P. (2d) 911, citing R. C. L.; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269.

The extent of the exercise and application of the police power of the state is determined by a consideration of the question of whether or not any invocation of that power in any given case, and as applied to existing conditions, is reasonably necessary to promote the public health, safety, morals, or general welfare of the people of the community. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460.

[5] Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A.L.R. 163; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; University Heights v. Cleveland Jewish Orphans' Home (C. C. A. 6th) 20 F. (2d) 743, 54 A.L.R. 1008, writ of certiorari denied in 275 U. S. 569, 72 L. ed. 431, 48 S. Ct. 141; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Re Crane, 27 Idaho, 671, 151 P. 1006, L.R.A. 1918A, 942, affirmed in 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A. 1915D, 607, Ann. Cas. 1915C, 183; Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L.R.A. 261, 75 Am. St. Rep. 93; Com. v. Smith, 163 Ky. 227, 173 S. W. 340, L.R.A. 1915D, 172; Goldman v. Crowther, 147 Md. 282, 128 A. 50, 38 A.L.R. 1455; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Skinner v. Thomas, 171 N. C. 98, 87 S. E. 976, L.R.A.1916E, 338; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.; State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353.

The police power may be exerted in the form of state legislation where otherwise the effect would be to invade rights guaranteed by the Federal Constitution only where the legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57.

[6] Abbey Land & Improv. Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann. Cas. 1915C, 804; Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878; Condon v. Forest Park, 278 Ill. 218, 115 N. E. 825, L.R.A.1917E, 314; Nahser v. Chicago, 271 Ill. 288, 111 N. E. 119, L.R.A. 1916D, 95; Haskell v. Howard, 269 Ill. 559, 109 N. E. 992, L.R.A.1916B, 893; Zion v. Behrens, 262 Ill. 510, 104 N. E. 836, 51 L.R.A.(N.S.) 562, Ann. Cas. 1915A, 1057; Chicago v. Pennsylvania Co. 252 Ill. 185, 96 N. E. 833, 36 L.R.A.(N.S.) 1081, Ann. Cas. 1912D, 400; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L.R.A.(N.S.) 1074; Massie v. Cessna, 239 Ill. 352, 88 N. E. 152, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L.R.A.(N.S.) 890; State v. Latham, 115 Me. 176, 98 A. 578, L.R.A.1917A, 480; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L.R.A.(N.S.) 735; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689, writ of error dismissed for want of jurisdiction in 170 U. S. 408, 42 L. ed. 1087, 18 S. Ct. 631; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

[7] Ex parte Lacey, 108 Cal. 326, 41 P. 411, 38 L.R.A. 640, 49 Am. St. Rep. 93; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; People v. Orange County Road Constr. Co. 175 N. Y. 84, 67 N. E. 129, 65 L.R.A. 33.

in a degree that is perceptible and clear,[8] either in preventing some offense or manifest evil or in furthering some such object.[9] The means employed should not go beyond the necessities of the case.[10]

The mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not in itself bring that statute within the police power of a state,[11] for there must always be an obvious and real connection between the actual provisions of a police regulation and its avowed purpose[12] and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained.[13] A statute or ordinance which has no real, substantial, or rational re-

[8] Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

[9] Marrs v. Oxford (C. C. A. 8th) 32 F. (2d) 134, 67 A.L.R. 1336, writ of certiorari denied in 280 U. S. 573, 74 L. ed. 625, 50 S. Ct. 29; People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L.R.A. 1074; State v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.

The police power does not extend to the exclusion of young women from restaurants kept by Chinese persons, since such a regulation has no direct relation to the evil to be remedied. Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L.R.A.(N.S.) 604.

[10] House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158.

[11] See infra, §§ 305, 306.

[12] California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Atchison, T. & S. F. R. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; Laurel Hill Cemetery v. San Francisco, 153 Cal. 464, 93 P. 70, 27 L.R.A. (N.S.) 260, 14 Ann. Cas. 1080; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292; Chicago B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; Ætna F. Ins. Co. v. Jones, 78 S. C. 445, 59 S. E. 148, 13 L.R.A. (N.S.) 1147, 125 Am. St. Rep. 818; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[13] Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L.R.A.(N.S.) 338, Atchison, T. & S. F. R. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; Helena v. Dwyer, 64 Ark. 424, 39 L.R.A. 266, 42 S. W. 1071, 62 Am. St. Rep. 206; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A. (N.S.) 1030; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775 Ann. Cas. 1917C, 1065; People v. Wilson, 249 Ill. 195, 94 N. E. 141, 35 L.R.A. 1074; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Durgin v. Minot, 203 Mass. 26, 84 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. Rep. 681; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788; Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L.R.A. 178, 19 Am. St. Rep. 490; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State v. Boone, 84 Ohio St. 346, 95 N. E. 924, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 718; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am.

lation to the public safety, health, morals, or general welfare is a palpable invasion of rights secured by the fundamental law and cannot be sustained as a legitimate exercise of the police power.[14] One application of the familiar rule that the validity of an act is to be determined by its practical operation and effect, and not by its title or declared purpose,[15] is that a constitutional right cannot be abridged by legislation under the guise of police regulation.[16] The exercise of the power must have a substantial basis and cannot be made a mere pretext for legislation that does not fall within it.[17] The legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen,[18] to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations,[19] or to invade property rights.[20]

St. Rep. 971, 1 Ann. Cas. 550; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; State v. Wetzel, 208 Wis. 603, 243 N. W. 768, 86 A.L.R. 274; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408.

Annotation: 78 Am. St. Rep. 238.

[14] Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A. 1917F, 1163, Ann. Cas. 1917D, 973; Henning-ton v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

As to the duty of the court in such a case, see infra, § 306.

[15] See supra, § 101.

[16] Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Hale v. State, 217 Ala. 403, 116 So. 369, 58 A.L.R. 1333; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Joseph v. Randolph, 71 Ala. 499, 46 Am. Rep. 347; Atchison, T. & S. F. R. Co. v. State, 33 Ariz. 440, 265 P. 602, 58 A.L.R. 563; Ex parte Drexel, 147 Cal. 763, 32 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878; Plumb v. Christie, 103 Ga. 686, 30 S. E. 759, 42 L.R.A. 181; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706, 117 Am. St. Rep. 412; State v. Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L.R.A. 347, 84 Am. St. Rep. 360; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L.R.A. 442; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St Rep. 557; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 925, 1 Ann. Cas. 927.

[17] State ex rel. Sale v. Stahlman, 81 W. Va. 335, 94 S. E. 497, L.R.A.1918C, 77.

[18] Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; Chicago v. Kautz, 313 Ill. 196, 144 N. E. 805, 35 A.L.R. 1050; Cortland v. Larson, 273 Ill. 602, 113 N. E. 51, L.R.A.1917A, 314, Ann. Cas. 1916E, 775; Haskell v. Howard, 269 Ill. 550, 109 N. E. 992, L.R.A.1916B, 893; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L.R.A.1917B, 551; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

See infra, §§ 330 et seq.

[19] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654; Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57; Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Shreveport v. Shreveport R. Co. (C. C. A. 5th) 38 F. (2d) 945, 69 A.L.R. 340, writ of certiorari denied in 281 U. S. 763, 74 L. ed.

§ 304. Test.—It is difficult, if not impossible, to lay down an all-embracing test of reasonableness by which the great variety of situations impelling legislative regulation can be measured. Thus, what constitutes a reasonable interference with private property by the exercise of the police power is a matter for which there is no certain test, but one which rests in human judgment.[1] Some generalizations which are controlling in all situations may be drawn from the cases.[2] Legislation must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious.[3] Hence, police regulations cannot arbitrarily interfere with the enjoyment of the rights of property

1172, 50 S. Ct. 462; Birmingham v. Hood-McPherson Realty Co. 233 Ala. 352, 172 So. 114, 108 A.L.R. 1140; Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; San Diego Tuberculosis Asso. v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A.L.R. 513; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; Frost v. Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Denver v. Frueauff, 39 Colo. 20, 88 P. 389, 7 L.R.A.(N.S.) 1131, 12 Ann. Cas. 521; Stoutenburgh v. Frazier, 16 App. D. C. 229, 48 L.R.A. 220; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A. 1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915C, 292; Spann v. Gaither, 152 Md. 1, 136 A. 41, 50 A.L.R. 620; State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A.(N.S.) 344, Ann. Cas. 1913A, 1247; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 71 N. W. 400, 38 L.R.A. 672, 64 Am. St. Rep. 6; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 144 N. W. 795, 49 L.R.A.(N.S.) 1123; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; State v. Lipkin, 169 N. C. 265, 84 S. E. 340, L.R.A.1915F, 1018, Ann. Cas. 1917D, 137; State v. Boone, 84 Ohio St. 346, 95 N. E. 924, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L.R.A. 850; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion); Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[20] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; Re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Condon v. Forest Park, 278 Ill. 218, 115 N. E. 825, L.R.A.1917E, 314; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A.1915D, 607, Ann. Cas. 1915C, 183; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 84 N. E. 1049, 17 L.R.A.(N.S.) 1071; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116; Pittsburgh, C. C. & St. L. R. Co. v. State, 180 Ind. 245, 102 N. E. 25, L.R.A.1915D, 458; Andrews v. Heiney, 178 Ind. 1, 98 N. E. 628, 43 L.R.A.(N.S.) 1023, Ann. Cas. 1915B, 1136; Train v. Boston Disinfecting Co. 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L.R.A. 498, 28 Am. St. Rep. 276; St. Louis v. Dreisoerner, 243 Mo. 217, 147 S. W. 998, 41 L.R.A.(N.S.) 177; Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 90 N. W. 649, 57 L.R.A. 890, 97 Am. St. Rep. 666; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 49, 68 Am. St. Rep. 736; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Ex parte Tomlinson, 54 Okla. Crim. Rep. 367, 22 P. (2d) 398, citing R. C. L.; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387; Ex parte Brown, 38 Tex. Crim. Rep. 295, 42 S. W. 554, 70 Am. St. Rep. 743; Ex parte Smythe, 116 Tex. Crim. Rep. 146, 28 S. W. (2d) 161, citing R. C. L.; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion).

Annotation: 6 L.R.A. 622.

Property cannot be taken from one man and given to another under the guise of police regulations. Knauer v. Louisville, 20 Ky. L. Rep. 193, 45 S. W. 510, 46 S. W. 701, 41 L.R.A. 219.

[1] Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

A possible application to extreme cases is not the test of the reasonableness of public rules and regulations. Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 S. Ct. 174.

[2] See cases cited infra, notes 3–19, this section.

[3] People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538.

or the personal rights guaranteed by the Constitution.[4] All statutory restrictions of the use of property must be imposed upon the theory that they are necessary for the safety, health, or comfort of the public. Accordingly, if a restriction or regulation is without reason or necessity, it cannot be enforced.[5] Regulation which impairs or destroys rather than preserves and promotes is within the condemnation of constitutional guaranties.[6] Where a business in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to destroy.[7] In proportion to the severity or extent of the exercise of the police power, a strict observance of the constitutional limitation upon the police power must be required, and the test has been thus stated: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it, and the facts that many men engaged in a calling persist in so conducting the business that the public suffers and their acts cannot otherwise be effectually controlled constitute no justification for a law which prohibits an honest man from conducting a business in such a manner as not to inflict injury upon the public.[8]

It has been said that the scope of the term "reasonable" as regards any situation must be measured having regard to the fundamental principles of human liberty as understood at the time of the formation of the Constitution, adapting the same to modern conditions,[9] and that established customs—the conventionalities of the time—are also matters to be considered.[10] In a recent case the Supreme Court has held that the reasonableness of the exercise of the police power of a state must be considered in the light of current economic conditions.[11] It has also stated that the action of a state legislature in enacting a police regulation attacked as unreasonable, and of the highest court in the state in upholding its validity, indicates the existence of evils for which it is an appropriate remedy.[12]

The test of reasonableness is met if the means adopted to carry the purpose of legislation into effect are fairly appropriate under all the circumstances.[13]

4 Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; Re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178; People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; Karasek v. Peier, 22 Wash. 419, 61 P. 33, 50 L.R.A 345; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

For a detailed discussion as to arbitrary measures under guise of police regulations, see supra, § 303.

5 Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; Hodge Drive-It-Yourself Co. v. Cincinnati, 123 Ohio St. 284, 175 N. E. 196, 77 A.L.R. 889, affirmed in 284 U. S. 335, 76 L. ed. 323, 52 S. Ct. 144; Bryan v. Chester, 212 Pa. 259, 61 A. 894, 108 Am. St. Rep. 870.

6 Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A.L.R. 219; State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353.

7 See supra, § 285.

8 Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L.R.A.(N.S.) 890.

9 Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061.

10 Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760.

11 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

12 O'Gorman & Young v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163.

13 State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

"By the term 'reasonable,' we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and especially if it appeared that it must have been adopted for some other purpose—such, for instance, as to favor or

Hence, if the means adopted are thus fairly appropriate, the test of reasonableness is met, even though the regulation is not necessarily what is best.[14] The effect and professed object must substantially agree and coincide,[15] and there must be a bona fide exercise of the reasonable discretion of the legislative department of government.[16] The test of reasonableness required in a statute based on the police power, as to whether it is in violation of the Constitution, has also been held to be whether in its attempted regulation it makes efficient constitutional guaranties and conserves rights or is destructive of inherent rights.[17] The regulation must tend to some ulterior good to which the destruction of liberty is merely incidental,[18] although it is not necessarily unreasonable because it results in inconvenience or loss to an individual.[19]

J. Court Review of Police Regulations

§ 305. Relationship of Legislature and Judiciary to Police Power.—The discretion of the legislature is very large in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests.[20] In fact

benefit, some person or class of persons—it certainly would not be reasonable, and would be beyond the power of the legislature to impose." Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L.R.A. 119.

As to appropriateness of means, see supra, § 303.

14 Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; People v. Perretta, 253 N. Y. 305, 171 N. E. 72, 84 A.L.R. 636; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

15 State ex rel. Sale v. Stahlman, 81 W. Va. 335, 94 S. E. 497, L.R.A.1918C, 77.

16 Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

17 People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

The legislative effort at regulation, within the police power, is not subject to condemnation, strictly speaking, because it is unreasonable, but because it impairs or destroys some inherent right, instead of conserving it. With respect to inherent rights, all which conserves is reasonable; that which impairs or destroys is unreasonable. Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L.R.A.(N.S.) 1009, Ann. Cas. 1915C, 1102.

18 State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

See supra, § 267.

19 Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584.

20 **United States.** — Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; O'Gorman & Young v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82; Erie R. Co. v. Williams, 233 U. S. 635, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 S. Ct. 10; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 S. Ct. 127; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Thurlow v. Massachusetts, 5 How. 504, 12 L. ed. 256.

Arizona. — State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736.

California. — Pacific Coast Dairy v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am. St. Rep. 152.

Colorado.—People v. Hupp, 53 Colo. 80, 123 P. 651, Ann. Cas. 1914A, 1177, 41 L.R.A.(N.S.) 792.

Connecticut. — State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Young v. Lemieux, 79 Conn. 434, 65 A. 436, 600, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452.

District of Columbia. — Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532.

Florida. — Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51.

Illinois. — People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; People v. Monroe, 349 Ill. 270, 182 N. E. 439, 85 A.L.R. 605; People v. Billardello, 319 Ill. 124, 149 N. E. 781, 42 A.L.R. 1146; People ex rel. Thrasher v. Smith, 275 Ill. 256, 114 N. E. 31, L.R.A.1917B, 1075.

Indiana. — Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas.

the courts often state that within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people and as to when and how the police power of the state is to be exercised.[1]

1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617.

Kansas. — Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406.

Maryland. — State v. Broadbelt, 89 Md. 565, 43 A. 771, 45 L.R.A. 433, 73 Am. St. Rep. 201.

Minnesota. — State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050; State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953, 5 A.L.R. 1449; State v. Smith, 58 Minn. 35, 59 N. W. 545, 25 L.R.A. 759.

Missouri. — State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402.

Nebraska. — Schwarting v. Ogram, 123 Neb. 76, 242 N. W. 273, 81 A.L.R. 769; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825; Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L.R.A. 762, 93 Am. St. Rep. 478.

New York. — Adamec v. Post, 273 N. Y. 250, 7 N. E. (2d) 120, 109 A.L.R. 1110; Barrett v. State, 220 N. Y. 423, 116 N. E. 99, L.R.A.1918C, 400, Ann. Cas. 1917D, 807.

North Dakota. — Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; State v. Armour & Co. 27 N. D. 177, 145 N. W. 1033, L.R.A.1916E, 380, Ann. Cas. 1916B, 1149, affirmed in 240 U. S. 510, 60 L. ed. 771, 36 S. Ct. 440.

Ohio. — State ex rel. Milhoof v. Board of Education, 76 Ohio St. 297, 81 N. E. 568, 10 Ann. Cas. 879.

Oregon. — State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003.

Rhode Island. — State v. Foster, 22 R. I. 163, 46 A. 833, 50 L.R.A. 339; Harrington v. Providence, 20 R. I. 233, 38 A. 1, 38 L.R.A. 305.

South Carolina. — Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A.1917E, 925.

South Dakota. — American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 125 N. W. 127, 41 L.R.A.(N.S.) 149.

Texas. — Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.

Washington. — State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.

Wisconsin. — State ex rel. Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 33 A.L.R. 269; Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, L.R.A.1915F, 1196, Ann. Cas. 1914B, 199; Priewe v. Wisconsin State Land & Improv. Co. 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

Wyoming. — State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

A difference of opinion among experts as to the suitableness of the equipment required by a police regulation does not preclude the exercise of legislative discretion in the matter. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829.

[1] **United States.** — Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642; Hough v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 S. Ct. 693; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 S. Ct. 714; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Walker v. Pennsylvania, 127 U. S. 699, 32 L. ed. 261, 8 S. Ct. 997; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; New York v. Miln, 11 Pet. 102, 9 L. ed. 648.

Alabama.—Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A.1916C, 278; Equitable Loan & Secur. Co. v. Edwardsville, 143 Ala. 182, 38 So. 1016, 111 Am. St. Rep. 34.

Arkansas. — Missouri & N. A. R. Co. v. State, 92 Ark. 1, 121 S. W. 930, 31 L.R.A. (N.S.) 861, 135 Am. St. Rep. 164.

California. — Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Re Madera Irrig. Dist. 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 109.

Colorado. — Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; People v. Hupp. 53 Colo. 80, 41 L.R.A.(N.S.) 732, Ann. Cas. 1914A, 1177; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80.

Connecticut. — Silver v. Silver, 108 Conn. 371, 143 A. 240, 65 A.L.R. 943, affirmed in 280 U. S. 117, 74 L. ed. 221, 50 S. Ct. 57; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Re Clark, 65 Conn. 17, 31 A. 522, 28 L.R.A. 242.

Florida.—Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558.

Georgia.—Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66, 54 A.L.R. 1001, writ of certiorari denied in 271 U. S. 672, 70 L. ed. 1144, 46 S. Ct. 486; Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 33 L.R.A.(N.S.) 20.

Idaho.—Packard v. O'Neil, 45 Idaho, 427, 262 P. 881, 56 A.L.R. 317.

Illinois.—People v. Linde, 341 Ill. 269, 173 N. E. 361, 72 A.L.R. 997; People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N. E. 815, 22 A.L.R. 835; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321.

Indiana.—Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L.R.A. 313; Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L.R.A. 679, 49 Am. St. Rep. 222; Jamieson v. Indiana Mut. Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652.

Iowa.—Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322.

Kansas.—Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254; Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790.

Kentucky.—Sallsbury v. Equitable Purchasing Co. 177 Ky. 348, 197 S. W. 813, L.R.A.1918A, 1114; State Racing Com. v. Latonia Agri. Asso. 136 Ky. 173, 123 S. W. 681, 25 L.R.A.(N.S.) 905.

Louisiana.—State v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92.

Massachusetts. — Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842, writ of error dismissed in 207 U. S. 599, 52 L. ed. 358, 28 S. Ct. 253.

Minnesota.—State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L.R.A.(N.S.) 260.

Missouri.—Cape Girardeau v. St. Louis-San Francisco R. Co. 305 Mo. 590, 267 S. W. 601, 36 A.L.R. 1488.

Montana.—State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

Nebraska. — State v. Drayton, 82 Neb. 254, 117 N. W. 768, 23 L.R.A.(N.S.) 1287, 130 Am. St. Rep. 671.

New York.—People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

North Carolina.—State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472.

North Dakota.—State ex rel. McCurdy v. Bennett, 37 N. D. 465, 163 N. W. 1063, L.R.A.1917F, 1076.

Ohio.—Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686.

Oregon.—Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; State v. Miller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88.

Pennsylvania.—New Castle v. Withers, 291 Pa. 216, 139 A. 860, 57 A.L.R. 132.

South Carolina.—Merchants & P. Bank v. Brigman, 106 S. C. 362, 91 S. E. 332, L.R.A. 1917E, 925.

Tennessee.—State ex rel. Lightman v. Nashville, 166 Tenn. 191, 60 S. W. (2d) 161, citing R. C. L.; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834.

Texas.—Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616.

Vermont.—State v. Morse, 84 Vt. 387, 80 A. 189, Ann. Cas. 1913B, 218.

Washington.—State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A. 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927.

West Virginia.—Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

Wisconsin.—State v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L.R.A. 157, 60 Am. St. Rep. 123.

Wyoming.—State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

"The legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the Constitution." Frost v. Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468.

The state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary and unreasonable attempts to exercise the authority vested in the state in the public interest. Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625.

See supra, §§ 192, 199.

[2] People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535.

[3] Jacob Ruppert v. Caffey, 251 U. S. 264, 64 L. ed. 260, 40 S. Ct. 141; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44; State ex rel. Black v. Delaye, 193 Ala. 500, 68 So. 993, L.R.A. 1915E, 640; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685.

The Supreme Court in passing upon a state statute enacted upon a belief of evils that is not arbitrary cannot measure their extent against the estimate of the legislature. Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379.

Where the power to prohibit exists, the reasonableness of any regulation is palpably a legislative question, pure and simple. Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A.1918B, 909, Ann. Cas. 1918C, 942.

Thus, it is for the legislature to determine when conditions exist calling for the exercise of the police power to meet existing public evils;[2] and when exerting its authority to suppress what it is free to regard as such an evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its acts effective.[3] It follows that so long as an act of the legislature does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitations upon the means of living or some material right essential to the enjoyment of life, the legislative determination

as to the necessity for police regulation and the method to be employed is conclusive upon the courts.[4] In other words, so long as the police power of the state is not arbitrarily or unreasonably exercised, and is not violative of any constitutional provision, the courts will not interfere.[5]

Legislative determination is conclusive upon the courts only within constitutional limits, which leaves open for judicial inquiry all questions as to the actual effect of attempted police measures upon constitutional rights.[6] The reasons for the rule are patent. Since the judicial branch of the government ascertains the validity of all legislation as measured by the Federal and state Constitutions[7] and since the police power is subordinate to the organic law,[8] the broad scope of the power does not place every regulation touching it without legislative competence, because of the power of the courts to determine whether legislative action conflicts with the organic law or is arbitrary and unreasonable and therefore void.[9] Hence, a determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts.[10]

4 Old Dearborn Distributing Co. v. Seagram-Distillers Corp. 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965; People v. Witte, 315 Ill. 282, 146 N. E. 178, 37 A.L.R. 672; People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N. E. 815, 22 A.L.R. 835; Carr v. State, 175 Ind. 241, 93 N. E. 1071, 32 L.R.A. (N.S.) 1190; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Des Moines v. Manhattan Oil Co. 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A.L.R. 1322; Balch v. Glenn, 85 Kan. 735, 119 P. 67, 43 L.R.A.(N.S.) 1080, Ann. Cas. 1913A, 406; State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L.R.A. 402; Luck v. Sears, 29 Or. 421, 44 P. 693, 32 L.R.A. 738, 54 Am. St. Rep. 804; Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.

Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to affect, the legislature transcends the limits of its power in interfering with liberty of contract, but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259.

As long as a statute has a substantial relation to the welfare of the general public, protects and conserves constitutional guaranties, and appears to be a reasonable exercise of the police power in relation to the purpose involved, it will be held valid, and within these limits the exercise of legislative discretion is not subject to judicial review. Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

Where the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. Ashland Transfer Co. v. State Tax Commission, 247 Ky. 144, 56 S. W. (2d) 691, 87 A.L.R. 534.

The legislature only can decide when an exigency exists for the exercise of the police power, and its determination is conclusive upon the judiciary. Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A. 1917D, 1040.

The right of the legislature to declare what is public policy justifying an exercise of the police power is limited only by a consideration that its action in the matter may not be arbitrary, but must be rested upon some tangible and reasonably clear public purpose to be served and which has a reasonably substantial tendency to further the interest of the public welfare. Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789.

5 State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137.

The aid of the judiciary may be invoked to protect rights guaranteed by Constitutions from the arbitrary abuse of the police power, but the principle remains that the legitimate exercise of that power is a function of the legislative department, with the discharge of which the judiciary has no mission to interfere. State v. McCormick, 142 La. 580, 77 So. 288, L.R.A. 1918C, 262.

6 Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Southern Exp. Co. v. Whittle, 194 Ala. 406, 69 So. 652, L.R.A.1916C, 278; State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879, Ann. Cas. 1915B, 659; Eccles v. Ditto, 23 N. M. 235, 167 P. 726, L.R.A.1918B, 126; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156.

As to the duty of the court to declare invalid an unconstitutional attempt to exercise power, see infra, § 306.

7 See supra, §§ 86 et seq.

8 See supra, §§ 259 et seq.

9 State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336.

10 **United States.**—Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A. 1918C, 765, Ann. Cas. 1918E, 660; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 S. Ct. 10; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 S. Ct. 499; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273.

Arkansas.—Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A.(N.S.) 482, 122 Am. St. Rep. 47.

California.—Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301.

Connecticut. — State v. Kievman, 116 Conn. 458, 165 A. 601, 88 A.L.R. 962; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131.

Florida.—Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558.

Georgia.—Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66, 54 A.L.R. 1001.

Illinois.—Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Chicago v. Washingtonian Home, 289 Ill. 206, 124 N. E. 416, 6 A.L.R. 1584; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893.

Indiana.—State v. Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899.

Kentucky.—Sallsbury v. Equitable Purchasing Co. 177 Ky. 348, 197 S. W. 813, L.R.A.1918A, 1114.

Louisiana.—State v. McCormick, 142 La. 580, 77 So. 288, L.R.A.1918C, 262; New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A.1917E, 761, Ann. Cas. 1918B, 1032.

Maryland.—Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819.

Massachusetts.—Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276.

Minnesota.—State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607.

Mississippi.—Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325.

Missouri.—State v. Miksicek, 225 Mo. 561, 125 S. W. 507, 135 Am. St. Rep. 597.

New York.—People v. Weller, 237 N. Y. 316, 143 N. E. 205, 38 A.L.R. 613, affirmed in 268 U. S. 319, 69 L. ed. 978, 45 S. Ct. 556; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Colon v. Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L.R.A. 543; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

North Carolina.—MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.

Ohio.—Mirick v. Gims, 79 Ohio St. 174, 86 N. E. 880, 20 L.R.A.(N.S.) 42.

Oregon.—Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217.

Pennsylvania.—White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215.

Rhode Island.—O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590.

Texas.—St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 84 S. W. 648, 70 L.R.A. 850; State v. Smith (Tex. Civ. App.) 47 S. W. (2d) 642, citing R. C. L.; Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.

Utah.—Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

Virginia.—Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

West Virginia.—Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

Wisconsin.—John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463; State v. Redmon, 134 Wis. 89, 114 N. W. 137, 126 Am. St. Rep. 1003, 14 L.R.A.(N.S.) 229, 15 Ann. Cas. 408.

11 Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168, affirming 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56; Hunt v. Douglas Lumber Co. 41 Ariz. 276, 17 P. (2d) 815, citing R. C. L.; Smith v. Mahoney, 22 Ariz. 342, 197 P. 704, citing R. C. L.; Helena v. Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L.R.A. 266, 62 Am. St. Rep. 206; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A.(N.S.) 260, 14 Ann. Cas. 1080; Re Madera Irrig. Dist. 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St. Rep. 106; Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66, 54 A.L.R. 1001, later appeal in 165 Ga. 146, 140 S. E. 369, and writ of certiorari denied in 271 U. S. 672, 70 L. ed. 1144, 46 S. Ct. 486; Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A.(N.S.) 998; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557, affirmed in 170 U. S. 57, 42 L. ed. 948, 18 S. Ct. 513; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; Health Dept. v. Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L.R.A. 710, 45 Am. St. Rep. 579; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Salt Lake Tribune Pub. Co. 68 Utah, 187, 249 P. 474, 48 A.L.R. 553 (concurring opinion).

A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. Coppage v. Kansas, 236 U.

The cases are in complete accord in holding that a mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not of itself bring such statute within the police power of a state.[11] Hence,

in the exercise of such power, the legislature cannot, by its mere fiat, make that reasonable which is indisputably unreasonable.[12] Legislative bodies, under the guise of police regulations protecting the public welfare, cannot arbitrarily pass laws which have no relation to that object;[13] and if the principal purpose of a statute is to give an advantage to one class of citizens to the disadvantage of others, the courts will look behind even the declared intent of the legislature and relieve citizens against the oppressive act.[14]

Very many questions arise concerning the ability to exercise the police power in connection with certain situations, coupled with the inseparable problems as to what will be the result of exercising power in such situations. These questions are judicial in nature, and in its last analysis, the question of the validity of measures enacted under the police power is one for the court.[15] Thus, whether legislation is actually within the police power,[16] or stating the proposition more correctly, whether the power has been exercised within the proper limitations,[17] whether the facts of a particular case warrant the assertion of the power,[18] whether a measure is reasonable or arbitrary,[19] whether a particular measure is designed to further some governmental function or private gain,[20] what are subjects of the lawful exercise of the police power,[1] and

S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A. 1915C, 960.

12 Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179.

13 Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L.R.A.(N.S.) 260, 14 Ann. Cas. 1080; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L.R.A. 64, 80 Am. St. Rep. 195; Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100; State v. Legendre, 138 La. 154, 70 So. 70, L.R.A.1916B, 1270; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

As to the rule against legislative encroachments under guise of the police power, see supra, § 303.

14 John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463.

15 People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66, 54 A.L.R. 1001, later appeal in 165 Ga. 146, 140 S. E. 369, and writ of certiorari denied in 271 U. S. 672, 70 L. ed. 1144, 46 S. Ct. 486; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 218; State v. Spyer, 67 Vt. 502, 32 A. 476, 29 L.R.A. 573, 48 Am. St. Rep. 832; Sutherland v. Miller, 79 W. Va. 796, 91 S. E. 993, L.R.A.1917D, 1040.

16 Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A.L.R. 819.

17 State v. Namias, 49 La. Ann. 618, 21 So. 852, 62 Am. St. Rep. 657; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; Douglass v. Greenville, 92 S. C. 374, 75 S. E. 687, 49 L.R.A.(N.S.) 958.

18 Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121; Patton v. Bellingham, 179 Wash. 566, 38 P. (2d) 364, 98 A.L.R. 1076.

19 Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 73 L. ed. 161, 49 S. Ct. 69, 62 A.L.R. 805; Jay Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. ed. 813, 44 S. Ct. 412, 32 A.L.R. 661; Missouri & N. A. R. Co. v. State, 92 Ark. 1, 121 S. W. 930, 31 L.R.A.(N.S.) 861, 135 Am. St. Rep. 164; State Sav. & C. Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675, affirmed in 238 U. S. 611, 59 L. ed. 1488, 35 S. Ct. 792; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; Windsor v. Whitney, 95 Conn. 357, 111 A. 354, 12 A.L.R. 669; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; State v. Boone, 84 Ohio St. 346, 85 Ohio St. 313, 95 N. E. 924, 97 N. E. 975, 39 L.R.A.(N.S.) 1015, Ann. Cas. 1912C, 683; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A.L.R. 1121.

Where the cost of eliminating a grade crossing of a railroad right of way at the command of the public is questioned, the court must determine whether it is within reasonable limits. Lehigh Valley R. Co. v. Public Utility Comrs. 278 U. S. 24, 73 L. ed. 161, 49 S. Ct. 69, 62 A.L.R. 805.

20 MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; Priewe v. Wisconsin State Land & Improv. Co. 103

whether an act bears any reasonable and substantial relation to the public purpose sought to be accomplished[2] are all judicial questions.

§ 306. Duty and Right of Courts.—In accordance with the general rule that where the validity of legislation is properly raised, it is the duty of the judiciary to determine its constitutionality,[3] when police statutes are challenged as an invasion of rights and liberties guaranteed by the fundamental law, it becomes the duty of the courts to determine whether the exercise of power is really necessary for the public good.[4] It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare,[5] and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution.[6] Only in

Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

1 Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; Cortland v. Larson, 273 Ill. 602, 113 N. E. 51, L.R.A.1917A, 314, Ann. Cas. 1916E, 775; Haskell v. Howard, 269 Ill. 550, 109 N. E. 992, L.R.A.1916B, 893; People v. Elerding, 254 Ill. 579, 98 N. E. 982, 40 L.R.A.(N.S.) 893; People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699, Ann. Cas. 1915A, 1163; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577.

2 Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 S. Ct. 341, 4 Ann. Cas. 1175; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L.R.A.(N.S.) 1030; Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N. E. (2d) 929, 104 A.L.R. 1435, affirmed in 299 U. S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; State Bank & T. Co. v. Wilmette, 358 Ill. 311, 193 N. E. 131, 96 A.L.R. 1327; People v. Belcastro, 356 Ill. 144, 190 N. E. 301, 92 A.L.R. 1223; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L.R.A.(N.S.) 179; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810, citing R. C. L.; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818.

Annotation: 64 Am. St. Rep. 487.

3 See supra, §§ 88, 111.

4 Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

5 Pitney v. Washington, 240 U. S. 387, 60 L. ed. 703, 36 S. Ct. 385; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 S. Ct. 379; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 S. Ct. 465; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Chicago v. Kautz, 313 Ill. 196, 144 N. E. 805, 35 A.L.R. 1050; Nahser v. Chicago, 271 Ill. 288, 111 N. E. 119, L.R.A.1916D, 95; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N. E. 315, L.R.A. 1915D, 607, Ann. Cas. 1915C, 183; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L.R.A. 265, 77 Am. St. Rep. 765; State ex rel. Pierce v. Gowdy, 62 Mont. 119, 203 P. 1115, citing R. C. L.; State v. Normand, 76 N. H. 541, 85 A. 899, Ann. Cas. 1913E, 996; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; Nance v. O. K. Houck Piano Co. 128 Tenn. 1, 155 S. W. 1172, Ann. Cas. 1914D, 834; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.

Annotation: 104 Am. St. Rep. 638.

The court may weigh the fact that the effectiveness of a statute creating, for the public good, an offense out of a former innocent act, is doubtful in connection with the interference of property rights in determining the validity of the act. State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

6 Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A.L.R. 163; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 S. Ct. 132; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 S. Ct. 265; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 S. Ct. 1086; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 10 S. Ct. 862; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Marbury v. Madison, 1 Cranch (U. S.)

cases, however, where the legislature exceeds its powers[7] will the courts interfere or set up their judgment against that of the legislature.[8] Thus, it is not the function of the Federal Supreme Court, under the authority of the Fourteenth Amendment to the Federal Constitution, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character which have no reasonable relation to the execution of lawful purposes.[9]

All general principles relating to the presumptions of validity surrounding legislation and to the duty of the courts to uphold legislative action if possible[10] apply with particular emphasis to exercises of the police power.[11] The constitutionality of such measures is presumed,[12] and it must also be presumed

137, 2 L. ed. 60; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; Williams v. State, 85 Ark. 464, 108 S. W. 838, 26 L.R.A. (N.S.) 482, 122 Am. St. Rep. 47; Re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; Smith v. Atlanta, 161 Ga. 769, 132 S. E. 66, 54 A.L.R. 1001, later appeal in 165 Ga. 146, 140 S. E. 369, and writ of certiorari denied in 271 U. S. 672, 70 L. ed. 1144, 46 S. Ct. 486; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; Berea College v. Com. 123 Ky. 209, 94 S. W. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L.R.A.(N.S.) 699; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; State v. Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L.R.A. 76; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L.R.A. 163, 83 Am. St. Rep. 487; State v. Williams, 146 N. C. 618, 61 S. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562; State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410; Juhan v. State, 86 Tex. Crim. Rep. 63, 216 S. W. 873, citing R. C. L.; State v. Packer Corp. 77 Utah. 500, 297 P. 1013, citing R. C. L.; Etheredge v. Norfolk, 148 Va. 795, 139 S. E. 508, 55 A.L.R. 781; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

Annotation: 78 Am. St. Rep. 238.

[7] Graves v. Minnesota, 272 U. S. 425, 71 L. ed. 331, 47 S. Ct. 122; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, 18 Ann. Cas. 865; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; New Castle v. Withers, 291 Pa. 216, 139 A. 860, 57 A.L.R. 132; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.

If a statute has a tendency to advance the welfare of the people, the court cannot declare it to be unconstitutional, unless it can be said to be unjustly or unlawfully discriminatory by making unjustifiable classifications, granting unlawful exemptions, denying citizens of other states the same privileges that are accorded citizens of the state, or unless it and the method of prescribing regulations are unreasonable so as to make compliance therewith oppressive or impracticable. State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

[8] State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State v. Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L.R.A. 76; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.

Before the Federal Supreme Court can hold a state statute void it must say that it has no reasonable connection with the common good and is not promotive of the peace, order, and well-being of the people and, in addition, adjudge that it violates rights secured by the Constitution of the United States. Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525.

[9] Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A.1918C, 765, Ann. Cas. 1918E, 660.

[10] See supra, §§ 128, 130.

[11] See cases cited infra, notes 12-1, this section.

[12] O'Gorman v. Hartford F. Ins. Co. 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163.

that the legislature has carefully investigated and determined that the interests of the public require such legislation,[13] for the courts are reluctant to attribute a want of good faith in the exercise of the power.[14] Moreover, it is their duty to sustain police measures unless such are clearly, plainly, and palpably in violation of the Constitution.[15] It is not enough that the case is a doubtful one;[16] the act must be so clearly unreasonable that the court can say that no fair-minded man can think it reasonable.[17] An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance.[18] Furthermore, a statute enacted for the protection of the public health will be upheld if by any fair construction it has a tendency to effect its object.[19] In one jurisdiction the court has taken the position that if a state of facts can reasonably be presumed to exist which would justify legislation under the police power, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power.[20] Elsewhere it has been stated that the doctrine that it is only when no state of circumstances could exist to justify the exercise of the police power that a law will be declared void is unsound.[1] The basic principles that courts only look to the constitutionality of legislation, and not to its propriety, justice, wisdom, necessity, expediency, or policy[2] have constantly been applied in cases involving police regulations.[3] If an act has a real and substantial

[13] Durand v. Dyson, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917D, 84.

A common belief may be acted upon by the legislature in the exercise of the police power without proof of its existence. Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475.

[14] Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30.

[15] Euclid v. Ambler Realty Co. 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A.L.R. 1016; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, 37 S. Ct. 190, L.R.A. 1918A, 136, Ann. Cas. 1917C, 594; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Green River v. Fuller Brush Co. (C. C. A. 10th) 65 F. (2d) 112, 88 A.L.R. 177; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Bland v. People, 32 Colo. 319, 76 P. 359, 65 L.R.A. 424, 105 Am. St. Rep. 80; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803; State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; New Castle v. Withers, 291 Pa. 216, 139 A. 860, 57 A.L.R. 132; State v. McKay, 137 Tenn. 280, 193 S. W. 99, Ann. Cas. 1917E, 158; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584.

[16] State v. Hutchinson Ice Cream Co. 168 Iowa, 1, 147 N. W. 195, L.R.A.1917B, 198, affirmed in 242 U. S. 153, 61 L. ed. 217, 37 S. Ct. 28, Ann. Cas. 1917B, 643.

[17] Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179.

[18] Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214.

[19] State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719.

[20] State v. Rossman, 93 Wash. 530, 161 P. 349, L.R.A.1917B, 1276; State v. Pitney, 79 Wash. 608, 140 P. 918, Ann. Cas. 1916A, 209.

[1] State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[2] See supra, §§ 134 et seq.

[3] Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A.L.R. 1481, affirming 189 Minn. 422, 249 N. W. 334, 86 A.L.R. 1507; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; Standard Oil Co. v. Marysville, 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 S. Ct. 270; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; Pacific Coast Dairy

relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds.[4] The courts will not assume to determine whether the measures are wise or the best that might have been adopted,[5] whether the laws are, if they meet constitutional requirements of reasonableness, for the good of the community,[6] whether they are invalid on the grounds

v. Police Ct. 214 Cal. 668, 8 P. (2d) 140, 80 A.L.R. 1217; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; G. S. Johnson Co. v. Belloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411; Booth v. State, 179 Ind. 405, 100 N. E. 563, L.R.A.1915B, 420, Ann. Cas. 1915D, 987, affirmed in 237 U. S. 391, 59 L. ed. 1011, 35 S. Ct. 617; State v. Erle, 210 Iowa, 974, 232 N. W. 279, 72 A.L.R. 137; State v. McCormick, 142 La. 589, 77 So. 288, L.R.A.1918C, 262; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 54 A.L.R. 1012, affirmed in 273 U. S. 671, 71 L. ed. 832, 47 S. Ct. 474; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; State v. Certain Intoxicating Liquors, 51 Utah, 569, 172 P. 1050, L.R.A. 1918E, 943; Hacker v. Barnes, 166 Wash. 558, 7 P. (2d) 607, 80 A.L.R. 1212; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

Where the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L.R.A.1915D, 538.

[4] Standard Oil Co. v. Marysville, 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 S. Ct. 270; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, writ of error dismissed in 273 U. S. 781, 71 L. ed. 889, 47 S. Ct. 460; Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; G. S. Johnson Co. v. Belloosky, 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; New Orleans v. Le Blanc, 139 La. 113, 71 So. 248, citing R. C. L.; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Jones Hollow Ware Co. v. Crane, 134 Md. 103, 106 A. 274, 3 A.L.R. 1658; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 54 A.L.R. 1012, affirmed in 273 U. S. 671, 71 L. ed. 832, 47 S. Ct. 474; Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L.R.A.(N.S.) 403, Ann. Cas. 1912C, 495; Sundeen v. Rogers, 83 N. H. 253, 141 A. 142, 57 A.L.R. 950; State v. Roberts, 74 N. H. 476, 69 A. 722, 16 L.R.A.(N.S.) 1115; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; State v. Wood, 51 S. D. 485, 215 N. W. 487, 54 A.L.R. 719; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

[5] Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, affirmed in 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; State v. Bassett, 100 Conn. 430, 123 A. 842, 37 A.L.R. 131; Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685; Re Crane, 27 Idaho, 671, 151 P. 1006, L.R.A. 1918A, 942, affirmed in 245 U. S. 304, 62 L. ed. 304, 38 S. Ct. 98; People ex rel. Barmore v. Robertson, 301 Ill. 422, 134 N. E. 815, 22 A.L.R. 835; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Com. use of Wilmore v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043, citing R. C. L.; State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N. W. 569, 54 A.L.R. 1012, affirmed in 273 U. S. 671, 71 L. ed. 832, 47 S. Ct. 474; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 130 N. W. 545, 33 L.R.A.(N.S.) 494, Ann. Cas. 1912B, 1030; Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; White's Appeal, 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 88 A. 775, 49 L.R.A.(N.S.) 917, Ann. Cas. 1915B, 157; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

[6] Grainger v. Douglas Park Jockey Club (C. C. A. 6th) 148 F. 513, 8 Ann. Cas. 997; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; State v. Packer Corp. 77 Utah, 500, 297 P. 1013, citing R. C. L.

of inexpediency,[7] or whether the exercise of the power was made in good or bad faith.[8]

§ 307. Rules as Applied to Municipal Ordinances.—In instances where the state Constitution grants home-rule powers of police to municipalities[9] or in instances in which the police power has been delegated by the legislature to a municipal corporation, the same general principles which govern the reasonableness of state police enactments have application, and the courts may inquire under the same rules into the reasonableness of the police measures enacted by the municipality.[10] It is important to distinguish between the common-law right of courts to review generally the question as to the reasonableness of any ordinances and bylaws of municipal corporations independent of constitutional questions and the right of the judiciary to scrutinize the reasonableness from a constitutional standpoint of enactments of the legislative department of a city, as well as of the state, made in the exercise of the police power.[11] It is the general rule that a municipal ordinance must be generally reasonable to be valid and that the reasonableness of a municipal ordinance is a proper subject for judicial inquiry, irrespective of any question as to the right of the judiciary to pass on the constitutional reasonableness of regulations enacted under the police power.[12] On the other hand, whenever a municipal corporation is expressly authorized by

[7] Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 S. Ct. 501; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 S. Ct. 10; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 S. Ct. 100; Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970, 96 Am. St. Rep. 95, reversed on other grounds in 195 U. S. 223, 47 L. ed. 169, 25 S. Ct. 18; Cureton v. State, 135 Ga. 660, 70 S. E. 332, 49 L.R.A.(N.S.) 182, writ of error dismissed in 229 U. S. 630, 57 L. ed. 1358, 33 S. Ct. 778; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, affirmed in 214 U. S. 91, 53 L. ed. 923, 29 S. Ct. 567; Davis v. State, 26 Ohio App. 340, 159 N. E. 575 (affirmed in 118 Ohio St. 25, 160 N. E. 473, which has writ of error dismissed in 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432) citing R. C. L.; State v. Packer Corp. 77 Utah, 500, 297 P. 1013 citing R. C. L.; Hadfield v. Lundin, 98 Wash. 657, 168 P. 516, L.R.A.1918B, 909, Ann. Cas. 1918C, 942; State v. Phelps, 144 Wis. 1, 128 N. W. 1041, 35 L.R.A.(N.S.) 353; State v. W. S. Buck Mercantile Co. 38 Wyo. 47, 264 P. 1023, 57 A.L.R. 675.

While the courts may not condemn police legislation because they regard it as inexpedient or unwise, yet the expediency is to be taken into account with respect to the importance of the public benefit the legislation seeks to promote, as well as the means it adopts to secure the benefit. Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067.

[8] Masonic Cemetery Asso. v. Gamage (C. C. A. 9th) 38 F. (2d) 950, 71 A.L.R. 1027, writ of certiorari denied in 282 U. S. 852, 75 L. ed. 755, 51 S. Ct. 30.

[9] See supra, § 17.

[10] Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; State v. Small, 126 Me. 235, 137 A. 398, citing R. C. L.; State v. Hyman, 98 Md. 596, 57 A. 6, 64 L.R.A. 637, 1 Ann. Cas. 742; Bettey v. Sidney, 79 Mont. 314, 257 P. 1007, 56 A.L.R. 872; State v. Hundley, 195 N. C. 377, 142 S. E. 330, 57 A.L.R. 506; Walcher v. First Presby. Church, 76 Okla. 9, 184 P. 106, 6 A.L.R. 1593; Ex parte Maynard, 101 Tex. Crim. Rep. 256, 275 S. W. 1070, citing R. C. L.

A municipal ordinance under the police power is to be regarded as in effect a statute of the state, adopted under a power granted it by the state legislature, and hence it is an act of the state within the Fourteenth Amendment. North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 S. Ct. 101, 15 Ann. Cas. 276.

As to the delegation of police power to local governmental bodies, see supra, § 256.

[11] Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064; Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L.R.A.1916F, 177, writ of error dismissed in 239 U. S. 653, 60 L. ed. 487, 36 S. Ct. 161.

[12] San Diego Tuberculosis Asso. v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A.L.R. 513; Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516; Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L.R.A. 768, 46 Am. St. Rep. 390; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; Welsh v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523; Standard Oil Co. v. Kearney, 106 Neb. 558, 184 N. W. 109, 18 A.L.R. 95.

Where the mode of exercising power conferred upon a municipal corporation is not prescribed, the exercise must be reasonable to be upheld. Mader v. Topeka, 106 Kan. 867, 189 P. 969, 15 A.L.R. 340.

See MUNICIPAL CORPORATIONS [Also 19 R. C. L. p. 805, §§ 112, 113].

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legislation or constitutional provisions to enact a certain ordinance in execution of the police power, such an ordinance stands on the same basis as a statute, and its reasonableness or unreasonableness is not a matter for the courts except as such a question would bear on the constitutionality of a statute of the same nature. In other words, as to such an ordinance, the common-law doctrine of the judicial review of the reasonableness of the bylaws of municipal corporations has no application.[13]

In accordance with the general principles governing the determination of the reasonableness of state legislation,[14] the question of the reasonableness of an ordinance is one in the first instance for the determination of the body which enacted it.[15] A city, as the arm of the state, has in the exercise of the police power a wide discretion in determining what precautions in the public interest are necessary and appropriate under the circumstances.[16] Its exercise of the police power will not be interfered with by the courts in the absence of a clear abuse of discretion,[17] unless it is manifestly unreasonable and oppressive,[18] for it is not within the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations to pass ordinances relating to objects within the proper domain of the police power.[19] Municipal bylaws and ordinances undertaking to regulate are, however, subject to investigation by the courts with a view to determining whether they are lawful exercises of the police power or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property.[20] Where the legislative enactment is manifestly unreasonable and arbitrary and offends against prohibitions within the Federal or state Constitution, it becomes the duty of the judiciary to declare the ordinance invalid.[1]

IX. FUNDAMENTAL RIGHTS AND PRIVILEGES

A. Constitutional Rights

§ 308. Generally.—The general constitutional guaranties are simply a protection to the fundamental or inherent rights which are common to all citizens.[2]

13 Hagerty v. Chicago, 360 Ill. 97, 195 N. E. 652, 98 A.L.R. 1210; General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453; Mader v. Topeka, 106 Kan. 867, 189 P. 969, 15 A.L.R. 340; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Kansas City v. Liebi, 298 Mo. 569, 252 S. W. 404, 28 A.L.R. 295; Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

In the determination of the validity of a municipal ordinance which is an exercise of the police power conferred upon municipalities by the state Constitution, it is unnecessary to consider the constitutionality of a statute expressly conferring power to adopt such an ordinance. Patton v. Bellingham, 179 Wash. 566, 38 P. (2d) 364, 98 A.L.R. 1076.

14 See supra, § 305.

15 General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Butte v. Paltrovich, 30 Mont. 18, 75 P. 521, 104 Am. St. Rep. 698; Re Wickstrum, 92 Neb. 523, 138 N. W. 733, 42 L.R.A.(N.S.) 1068.

16 New Orleans Pub. Service v. New Orleans, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449; General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453.

17 Gant v. Oklahoma City, 289 U. S. 98, 77 L. ed. 1058, 53 S. Ct. 530; General Outdoor Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A.L.R. 453.

18 State v. Stowe, 190 N. C. 79, 128 S. E. 481, 40 A.L.R. 559.

19 Gorieb v. Fox, 274 U. S. 603, 71 L. ed. 1228, 47 S. Ct. 675, 53 A.L.R. 1210; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 S. Ct. 18; Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045; Eros v. Powell, 137 La. 342, 68 So. 632, citing R. C. L.; Standard Oil Co. v. Kearney, 106 Neb. 558, 184 N. W. 109, 18 A.L.R. 95; State v. Hundley, 195 N. C. 377, 142 S. E. 330, 57 A.L.R. 506; State v. Stowe, 190 N. C. 79, 128 S. E. 481, 40 A.L.R. 559.

20 Pacific Palisades Asso. v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A.L.R. 782; Harrigan & Reid Co. v. Burton, 224 Mich. 564, 195 N. W. 60, 33 A.L.R. 142.

1 Daniels v. Portland, 124 Or. 677, 265 P. 790, 59 A.L.R. 512.

2 Rosa v. Portland, 86 Or. 438, 168 P. 936, L.R.A.1918B, 851.

As to fundamental principles and rights see infra, § 328.

Such constitutional provisions are a guaranty of rights, and not a limitation of them.[3] The guaranties and the rights so secured may not be made to yield to mere convenience.[4] If not warranted by any just occasion, the least imposition is oppressive.[5] The citizens of a free government are justly jealous of their constitutional rights and privileges, and this should be attributed to them as a virtue rather than a fault. It keeps them on the alert and inspires them with courage and determination in their efforts to resist the aggressions of arbitrary power. It is just as obligatory upon the citizen to resist encroachments upon his rights and liberties guaranteed by the Constitution as it is for him to uphold and maintain its integrity.[6]

A constitutional right is a right guaranteed to the citizens by the Constitution and so guaranteed as to prevent legislative interference with that right.[7] This guaranty insures the citizen the privilege of having such a right judicially declared and protected.[8] Thus, the right cannot be imposed on or destroyed under the guise or device of being regulated.[9] Individual rights under our Constitutions are immutable against all hostile legislation which is not required by considerations of public health or safety.[10] Constitutional rights, however, like others, are matters of degree, and thus the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation.[11] Every constitutional right or privilege must be enjoyed with such limitations as are necessary to make its enjoyment by each consistent with a like enjoyment by all, for the right of all is superior to the right of any one.[12]

§ 309. Bill of Rights.—Certain guaranties of rights, such as those providing protection against the exacting of excessive fines or the infliction of cruel and unusual punishments, are found in the Constitution of practically every state of the Union.[13] Constitutional guaranties of this character are, as a rule, inserted in that portion of the organic instrument which is known as the Bill of Rights, and it is customary to except such rights out of the general powers of government and to declare that they shall forever remain inviolate.[14] Primacy of position in the state Constitution is accorded the Declaration of Rights, thus emphasizing the importance of those basic and inalienable rights of personal lib-

3 State v. Nelson, 19 R. I. 467, 34 A. 990, 33 L.R.A. 559, 61 Am. St. Rep. 780.

4 Weaver v. Palmer Bros. Co. 270 U. S. 402, 70 L. ed. 654, 46 S. Ct. 320.

5 Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260, Ann. Cas. 1917D, 642.

6 Rio Grande Lumber Co. v. Darke, 50 Utah, 114, 167 P. 241, L.R.A.1918A, 1193.

7 Delaney v. Plunkett, 146 Ga. 547, 91 S. E. 561, L.R.A.1917D, 926, Ann. Cas. 1917E, 685.

The legislative power to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed to the citizen by the Constitution. Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

8 Lawrence v. State Tax Commission, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556, 87 A.L.R. 374.

9 Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319.

10 State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L.R.A. 791, 87 Am. St. Rep. 605.

As to the regulation of rights under the police power, see supra, §§ 259, 267.

11 Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 S. Ct. 26, 12 Ann. Cas. 555.

12 Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353.

As to the regulation of indivdual rights under the police power, see supra, § 267.

13 Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707.

14 Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440; Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450.

erty and private property which are thereby reserved and guaranteed to the people and protected from arbitrary invasion or impairment from any governmental quarter. The Declaration of Rights constitutes a limitation upon the powers of every department of the state government.[15]

Bills of Rights are to a large extent declaratory of fundamental principles[16] and of the basic rights of citizenship. They enumerate some of the private and inalienable rights of the people,[17] and it has been said that the rights protected by a Bill of Rights are those that inhere in "the great and essential principles of liberty and free government," recognized in the course of events which resulted in the Declaration of Independence and in the adoption of the Constitution.[18] These rights are sometimes referred to as natural laws[19] and as being founded in natural right or justice.[20] In this connection Chief Justice Marshall used this language: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment, and the Constitution of the United States contains what may be deemed a Bill of Rights for the people of each state."[1]

Bills of Rights are usually considered as being intended for the protection of individuals and of minorities.[2] While such fundamental rights which are recognized and declared, but not granted or created by the Constitution, are thereby guaranteed only against violation or abridgment by the United States or by the states, and cannot therefore be generally affirmatively enforced by Congress against unlawful acts of individuals, yet every right created by, arising under, or dependent upon, the Constitution of the United States may be protected and enforced by Congress by such means and in such manner as it may deem best.[3]

The Bills of Rights are not to be construed by themselves according to their literal meaning.[4] Since the declaration of general principles which they contain is not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in every case, they may up to a certain point be properly treated as guides for the political conscience of the legislature rather than as absolute limitations of its power.[5]

15 State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307.

16 Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707.

17 Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093.

18 United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; State v. Colon, 65 Conn. 478, 33 A. 519, 31 L.R.A. 55, 48 Am. St. Rep. 227.

19 Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093.

20 Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707.

See also supra, §§ 134, 135, 194.

As to "natural rights," see infra, § 328.

1 Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

2 Alford v. State, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093.

3 Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 S. Ct. 617.

4 Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

5 Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L.R.A. 854.

A declaration of a constitutional bill of rights that the rights of liberty and the pursuit of happiness are inalienable natural rights is a political maxim addressed to the wisdom of the legislature, and not a limitation upon its power, though it cannot be entirely disregarded. Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A. (N.S.) 877, Ann. Cas. 1913A, 254.

In some jurisdictions general statements in the bills of rights are held to be in the nature of limitations on the power of the legislature. See supra, § 194.

B. Federal and State Guaranties of Rights

1. United States

§ 310. First Ten Amendments to United States Constitution.—The First Ten Amendments to the Federal Constitution were adopted almost immediately after the adoption of the Constitution itself and are in the nature of a Bill of Rights. Their adoption was insisted on and took place in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights.[6] It is well settled that these ten amendments, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which the Colonists had inherited from their English ancestors and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.[7] In incorporating these principles into the fundamental law there was no intention of disregarding such exceptions, but instead they have been recognized as if they had been formally expressed in the text of the amendments.[8] For example, constitutional guaranties as to the right of life and liberty do not prevent the taking even of life itself in self-defense or in the defense of another under exceptional circumstances;[9] and, as another illustration of the principle, a provision that no person shall be twice put in jeopardy does not prevent a second trial if upon the first trial the jury failed to agree or if the verdict was set aside upon the defendant's motion.[10]

The extent of the operation of the Federal Bill of Rights is well settled. Since the Constitution of the United States only takes from the states for Federal exercise enumerated express powers and those necessarily implied[11] and, moreover, since the states are left with all powers of sovereignty the exercise of which is not expressly forbidden,[12] the limitations that the Constitution of the United States imposes upon the powers of government are upon the government of the Union only, except where the states are expressly mentioned.[13] In the applica-

6 Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622; Re McDonald, 49 Mont. 454, 143 P. 947, L.R.A. 1915B, 988.

"The founders of our government, in writing the Constitution, assumed the liberties of the people to be firmly established, and did not write them into the Constitution. The people of this country, however, having had experience under the British Crown, with writs of assistance, refused to accept the Constitution until assured of the adoption of amendments that would enumerate and preserve their liberties under a written Constitution. Accordingly, there was immediately adopted the 'Bill of Rights' contained in the First Ten Amendments to the Federal Constitution." Allen v. State, 183 Wis. 323, 197 N. W. 808, 39 A.L.R. 782.

7 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Scott v. Toledo (C. C.) 36 F. 385, 1 L.R.A. 688.

8 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326.

9 Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353.

10 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; Brantley v. State, 132 Ga. 573, 64 S. E. 676, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 16 Ann. Cas. 1203.

11 See supra, § 169.

12 See supra, § 170.

13 State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33; State v. Haffer, 94 Wash. 136, 162 P. 45, L.R.A.1917C, 610, Ann. Cas. 1917E, 229.

The clause of the Constitution of the United States which prohibits the issue of a warrant, except on probable cause supported by oath, applies only to the issue of warrants under the laws of the United States and has no application to state process. Smith v. Maryland, 18 How. (U. S.) 71, 15 L. ed. 269.

U. S. Const. Art. 3, providing for the trial of all crimes in the state where they were committed, applies only to trials in Federal courts, and not to trials in state courts. Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28.

The prohibition against giving any preference by any regulation of commerce or revenue to ports of one state over those of another which is made by U. S. Const. Art. 1, § 9, operates only as a limitation of the powers of Congress, and does not affect the states in the regulation of their domestic

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tion of this doctrine specifically to the guaranties contained in the Federal Bill of Rights, it has been held since the early days of our constitutional history that the First Ten Amendments or, as some of the authorities more accurately put it, the First Eight Amendments, forbid the abridgment only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states.[14] The doctrine so stated is still the law. Technically and strictly speaking, the first Eight Amendments

affairs. Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

14 **United States.**—Gaines v. Washington, 277 U. S. 81, 72 L. ed. 793, 48 S. Ct. 468; Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595, L.R.A. 1917A, 86, Ann. Cas. 1916E, 505; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 S. Ct. 40; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 S. Ct. 189; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73, 4 Ann. Cas. 689; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 S. Ct. 703; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650; McFaddin v. Evans-Snider-Buel Co. 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 S. Ct. 120; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56; Talton v. Mayes, 163 U. S. 376, 41 L. ed. 196, 16 S. Ct. 986; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 S. Ct. 874; Thorington v. Montgomery, 147 U. S. 490, 37 L. ed. 252, 13 S. Ct. 394; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 S. Ct. 105; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 S. Ct. 693; Trezza v. Brush, 142 U. S. 160, 35 L. ed. 974, 12 S. Ct. 158; McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 S. Ct. 156; Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 S. Ct. 675; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 S. Ct. 930; Ellenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 S. Ct. 424; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 9 S. Ct. 28; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. Ct. 482; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 S. Ct. 21; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Supreme Justices v. Murray (Supreme Justices v. United States) 9 Wall. 274, 19 L. ed. 658; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Withers v. Buckley, 20 How. 84, 15 L. ed. 816; Smith v. Maryland, 18 How. 71, 15 L. ed. 269; Fox v. State, 5 How. 410, 12 L. ed. 213; Livingston v. Moore, 7 Pet. 469, 8 L. ed. 751; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Scott v. Toledo (C. C.) 36 F. 385, 1 L.R.A. 688.

Alabama.—Banks v. State, 207 Ala. 179, 93 So. 293, 24 A.L.R. 1359, writ of certiorari denied in 260 U. S. 736, 67 L. ed. 488, 43 S. Ct. 96.

Arkansas.—Hammond Packing Co. v. State, 81 Ark. 519, 100 S. W. 407, 1199, 12 Am. St. Rep. 1047, affirmed in 212 U. S. 322, 53 L. ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645.

Georgia.—Johnson v. State, 152 Ga. 271, 109 S. E. 662, 19 A.L.R. 641; Griffin v. State, 142 Ga. 636, 83 S. E. 540, L.R.A.1915C, 716, Ann. Cas. 1916C, 80; Loeb v. Jennings, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 276; Brantley v. State, 132 Ga. 573, 64 S. E. 676, 22 L.R.A.(N.S.) 959, 131 Am. St. Rep. 218, 16 Ann. Cas. 1203.

Idaho.—State v. Myers, 36 Idaho, 396, 211 P. 440, citing R. C. L.

Illinois.—People v. Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L.R.A. 139.

Indiana.—Biggs v. State, 201 Ind. 200, 167 N. E. 129, 64 A.L.R. 1085; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 138 Am. St. Rep. 389; Barton v. Kimmerley, 165 Ind. 609, 72 N. E. 250, 112 Am. St. Rep. 252.

Kentucky.—Reed v. Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

Maine.—State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871.

Massachusetts.—Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 30 L.R.A. 734, 52 Am. St. Rep. 496.

Mississippi.—Tucker v. State, 128 Miss. 211, 90 So. 845, 24 A.L.R. 1377.

Montana.—State v. Gardner, 77 Mont. 8, 249 P. 574, 52 A.L.R. 454.

New York.—Lee v. Tillotson, 24 Wend. 337, 35 Am. Dec. 624; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L.R.A. 406, 98 Am. St. Rep. 675 affirmed in 192 U. S. 585, 48 L. ed. 575, 24 S. Ct. 372.

Ohio.—Grown v. Cleveland, 125 Ohio St. 455, 181 N. E. 897, 84 A.L.R. 708.

Oklahoma.—Scribner v. State, 9 Okla. Crim. Rep. 465, 132 P. 933, Ann. Cas. 1915B, 381.

Oregon.—State v. Swain, 147 Or. 207, 31 P. (2d) 745, 32 P. (2d) 773, 93 A.L.R. 921.

Rhode Island.—State v. Brown & S. Mfg. Co. 18 R. I. 16, 25 A. 246, 17 L.R.A. 856.

Tennessee.—State v. Norvell, 137 Tenn. 82, 191 S. W. 526, L.R.A.1917D, 586.

Vermont.—State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Virginia.—Southern Exp. Co. v. Com. 92 Va. 59, 22 S. E. 809, 41 L.R.A. 436.

Washington. — State v. McDowell, 61 Wash. 598, 112 P. 521, 32 L.R.A.(N.S.) 414, Ann. Cas. 1912C, 782.

West Virginia.—Ex parte McNeely, 36 W. Va. 84, 14 S. E. 436, 15 L.R.A. 226, 32 Am. St. Rep. 831.

Wyoming.—Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364; Kimball v. Grantsville City, 19 Utah, 368, 57 P. 1, 45 L.R.A. 628.

Annotation: 17 Ann. Cas. 232.

The First Eight Amendments to the Federal Constitution apply only to the Federal courts. Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 S. Ct. 287.

themselves do not forbid the states to abridge the rights which are so guaranteed against Federal infringement. The Supreme Court, in an early case, however, inferred that the First Eight Amendments did not apply to the states, "except so far as the Fourteenth Amendment may have made them applicable."[15] While the latter statement is broader than a strictly accurate statement of the law, nevertheless, as a practical matter, since the doctrine has become established that the due process clause of the Fourteenth Amendment in its concept of "liberty" forbids a denial of any of the fundamental principles of liberty and justice,[16] the rule is well established that any of the rights enumerated in the First Eight Amendments which may also be held to be in the nature of fundamental principles of liberty and justice are absolutely protected from any state action or infringement by the Fourteenth Amendment in exactly the same manner as they are protected from Federal abridgment by the guaranties of the Federal Bill of Rights.[17] As to incorporated territories, generally speaking, the guaranties of the Federal Bill of Rights are in full force and effect.[18]

It has been said that the limitations upon the power of the Federal Government, expressed in the Fifth Amendment, are to be read in connection with the similar limitations embodied in the Fourteenth Amendment,[19] because the restrictions under these two amendments are in many respects similar.[20]

§ 311. Later Amendments to United States Constitution.—Not all of the amendments ratified to the Federal Constitution since the first ten directly affect individuals by guaranties against infringement of their rights by governmental action, but each amendment, being an addition to the organic law, of course affects the relationship of the people to their governments, either national or state, and for that reason a brief résumé of each, together with judicial expressions of its purpose, is set forth herein.

The Eleventh Amendment prohibiting suits by private individuals against a state has been described as a limitation of a power supposed to have been granted in the original instrument.[1] The Twelfth Amendment regulates the mode of electing the President and Vice President of the United States and neither increases nor diminishes the power of the Federal Government and hence may be said in that respect to occupy neutral ground.[2]

The object of the Thirteenth Amendment was to abolish slavery and involuntary servitude except as a punishment for crime,[3] while the Fourteenth Amendment prohibited the states from abridging the privileges or immunities of citizens of the United States, or depriving persons of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The Thirteenth and Fourteenth Amendments are different from each other, and the powers of Congress under them are different. What Congress has the power to do under one, it may not have the power to do under

15 Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 16 S. Ct. 644.

16 See infra, §§ 311, 329 et seq.

17 See infra, § 311.

18 See STATES, TERRITORIES, AND DEPENDENCIES [Also TERRITORIES, 26 R. C. L. p. 673, § 13].

19 Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 S. Ct. 190.

20 Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 S. Ct. 88; Scott v. Toledo (C. C.) 36 F. 385, 1 L.R.A. 688; Moses v. United States, 16 App. (D. C.) 428, 50 L.R.A. 532; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821.

1 Missouri v. Fiske, 290 U. S. 18, 78 L. ed. 145, 54 S. Ct. 18; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

2 Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394 (dissenting opinion of Swayne, J.).

3 Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 S. Ct. 288; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

For a detailed discussion of the Thirteenth Amendment, see CIVIL RIGHTS, Vol. 10, p. 896, § 3.

the other. Under the Thirteenth Amendment, it has only to do with slavery and involuntary servitude and their incidents. Under the Fourteenth Amendment, it has the power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws.[4] In a fairly early case, the Supreme Court stated that the Thirteenth and Fourteenth Amendments were intended to be what they really are, limitations of the power of the states and enlargements of the power of Congress. They are, to some extent, declaratory of rights, and although in the form of prohibitions, they imply immunities, such as may be protected by congressional legislation.[5]

Due to the limitations which it places upon state power, the Fourteenth Amendment has come to be one of tremendous significance. In the ascertainment of the validity of state action or legislation from the standpoint of constitutionality, the test is by measurement to the guaranties included in the amendment, either the privileges and immunities of citizens or, more broadly, equal protection of the laws and due process of law to persons, for the rule is well settled that every state power is limited by the inhibitions of the Fourteenth Amendment.[6] The effect of the Fourteenth Amendment thus to limit the powers of the state and thereby to extend correspondingly the rights of persons safeguarded from abridgment is strikingly illustrated by the doctrine through which fundamental rights, similar in nature to the rights safeguarded from Federal abridgment by the First Eight Amendments, have already been protected and in a steadily expanding sphere of extent are constantly being protected from state infringement by the Fourteenth Amendment.[7] The Supreme Court pointed out at a fairly early date after the enactment of the Fourteenth Amendment, that it is possible that some of the personal rights safeguarded by the First Eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the First Eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[8] The general test as to whether a right is so included in the due process clause of the Fourteenth Amendment was said to be: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free govern-

[4] See CIVIL RIGHTS, Vol. 10, p. 900, § 7.
As to immunities guaranteed prior to the time of the adoption of the civil rights amendments, see CIVIL RIGHTS, Vol. 10, p. 895, § 2; for due process of law, see Vol. 12, Subd. XIV.; as to equal protection of laws, see Vol. 12, Subd. XIII.; as to the privileges and immunities of citizenship, see Vol. 12, Subd. XII.

[5] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

[6] Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260, 54 S. Ct. 148; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6; Alabama Pub. Serv. Commission v. Mobile Gas Co. 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241.
The prohibitions of the Fourteenth Amendment, against depriving any person of life, liberty, or property without due process of law or denying the equal protection of the laws, extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 S. Ct. 1108.
As to the Fourteenth Amendment and the police power, see supra, § 261.

[7] As to the effect of the due process clause to limit state abridgment of religious freedom, see infra, § 312; of freedom of speech and of the press, see infra, § 319; of the right to assemble peaceably and to petition the government, see infra, § 325.
As to the effect of the due process clause to permit the accused in a criminal case to be allowed to secure counsel for his defense or to require the effective appointment of counsel for him, see infra, § 316.

[8] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14. See also Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527.

ment and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."[9] Shortly thereafter, affirming in principle what it had intimated before, the Supreme Court laid down the rule which is now the accepted and settled principle, that the due process clause requires that state action, through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[10]

The Fifteenth Amendment to the Federal Constitution is a restriction upon state action.[11] The special object of this amendment was to put the right of suffrage, so far as race, color, and previous condition of servitude are concerned, forever at rest.[12] It has been held that the Fourteenth and Fifteenth Amendments do not limit the power of a state to prescribe the qualification of voters at elections of a special or local nature, as, for example, a local-option election,[13] assuming, of course, that there shall be no discrimination as between one citizen and another on account of race, color, or previous condition of servitude.[14]

The Sixteenth Amendment permits the imposition of a Federal income tax.[15] The Seventeenth Amendment provides for the election of United States Senators by a direct vote of the people of the several states.[16] The Eighteenth Amendment, which was repealed by the Twenty-first, prohibited generally the manufacture, sale, or transportation of intoxicating liquors within the United States, its territories, districts, or possessions.[17] The Nineteenth Amendment may be regarded as further limiting abridgment of the general suffrage rights of the people by providing that neither the United States nor any state shall deny or abridge the right of citizens to vote because of their sex.[18] The Twentieth Amendment governs the time at which the President and Vice President shall take office, certain matters governing the succession to those high executive offices, the time for the assembly of Congress, and the duty of Congress to assemble.[19] The primary purpose of the Twenty-first Amendment was to repeal the Eighteenth, but it also guarantees from violation any local liquor regulation of any state, territory, or possession.[20]

[9] Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14.

[10] De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255; Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444; Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406; Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A.L.R. 1102; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323; Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241; Ex parte Roman, 19 Okla. Crim. Rep. 235, 199 P. 580, citing R. C. L.; State v. Stimpson, 78 Vt. 124, 62 A. 14, 1 L.R.A.(N.S.) 1153, 6 Ann. Cas. 639.

[11] Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 S. Ct. 6.

[12] Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.
See CIVIL RIGHTS, Vol. 10, p. 895, § 2.

[13] Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L.R.A.(N.S.) 1009.

[14] See CIVIL RIGHTS, Vol. 10, p. 895, § 2.

[15] See INCOME TAXES.

[16] As to the right to vote for Federal officers as amounting to a privilege of national citizenship, see Vol. 12, Subd. XII.

[17] See INTOXICATING LIQUORS.

[18] People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N. E. 145, 71 A.L.R. 1327.
The Nineteenth Amendment to the Constitution of the United States emancipates women so far only as the right of suffrage is concerned, and does not operate in terms or by implication to qualify them as jurors. State v. James, 96 N. J. L. 132, 114 A. 553, 16 A.L.R. 1141.
See ELECTIONS.

[19] For a discussion of matters relating generally to the Federal executive and legislative departments, see UNITED STATES [Also 26 R. C. L. p. 1419, §§ 7 et seq.].

[20] See INTOXICATING LIQUORS.

§ 312. Religious Freedom.—The Constitution of the United States forbids Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof.[1] This provision of the First Amendment is technically an inhibition to Congress only, and not to the states.[2] The Supreme Court held, in a case decided before the adoption of the Fourteenth Amendment, that at that time there was no provision in the Federal Constitution for the protection of the religious liberties of citizens of the respective states and that this was left to the state Constitutions and laws.[3] The states are now, however, probably precluded from abridging religious liberties by the due process clause of the Fourteenth Amendment, for, although the Supreme Court has not passed directly on the question,[4] it has stated that the liberty protected by the due process clause of the Fourteenth Amendment includes the right to worship God according to the dictates of one's own conscience.[5] Moreover, Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion.[6]

The state courts have been emphatic in recognizing the basic nature of the right.[7] The right of a man to worship God, or even to refuse to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical, is as fundamental in a free government like ours as is the right to life, liberty, or the pursuit of happiness.[8]

The First Amendment was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, to exhibit his sentiments in such form of worship as he thinks proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect.[9] The idea of the founding fathers was that church and state be kept separate

[1] Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224, overruled on another point in State v. Baum, 33 La. Ann. 981.

"The oppressive measures adopted and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of the [First] Amendment." Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299.

[2] State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224, overruled on another point in State v. Baum, 33 La. Ann. 981; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871.

[3] Permoli v. New Orleans, 3 How. (U. S.) 389, 11 L. ed. 739.

Civil and religious liberties are political rights. Ibid.

[4] In Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, in a concurring opinion, Justice Cardozo said: "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states. . . . The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof.'" See Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377.

[5] Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446.

[6] Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

[7] Ex parte Burke, 59 Cal. 6, 43 Am. Rep. 239 ("absolute right of individuals").

[8] Knowlton v. Baumhover, 182 Iowa, 691, 166 N. W. 202, 5 A.L.R. 841.

"The crowning glory of American freedom is absolute religious liberty; every American has the unquestioned and untrammeled right to worship God according to the dictates of his own conscience, without let or hindrance from any person or any source." Cline v. State, 9 Okla. Crim. Rep. 40, 130 P. 510, 45 L.R.A.(N.S.) 108.

[9] Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299. See also Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666.

so that the legislative powers of the government could reach actions only and not opinions.[10]

The state Constitutions contain general guaranties insuring every person of the right to worship according to the dictates of his own conscience.[11] Some differences exist in the several state Constitutions on the subject of the freedom of religion, although, in general, perfect equality before the law is conceded to all shades of religious belief.[12] The word "religion" is not de-

[10] Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

"If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state. . . . The idea that it is a proper function of government to assume authority on matters of religion and lend the powers of sovereignty to its advancement was once quite general, with result that the union of the state with the particular church which happened to be in the majority developed conditions so destructive of natural rights and individual liberty as to become the prolific occasion of revolution and bloodshed. To that cause more than any other we owe the settlement of this country by fugitives from religious persecution, and the foundation and development of a government here on the theory of an absolute divorce between civil and ecclesiastical affairs." Knowlton v. Baumhover, 182 Iowa, 691, 166 N. W. 202, 5 A.L.R. 841.

The state should not only keep its own hand off, but also see to it that religious sects keep their hands off, each other. It must let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. This is the true republican doctrine; it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict free. Meantime, the state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge. Board of Education v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233.

[11] Vanhorne v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857 (Pennsylvania); Evans v. Selma Union High School Dist. 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121; Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334; State v. Morris, 28 Idaho, 599, 155 P. 296, L.R.A.1916D, 573; Knowlton v. Baumhover, 182 Iowa, 691, 166 N. W. 202, 5 A.L.R. 841; Billard v. Board of Education, 69 Kan. 53, 76 P. 442, 66 L.R.A. 166, 105 Am. St. Rep. 148, 2 Ann. Cas. 521; Hackett v. Brooksville Graded School Dist. 120 Ky. 608, 87 S. W. 792, 69 L.R.A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36; Herold v. Parish Bd. 136 La. 1034, 68 So. 116, L.R.A. 1915D, 941, Ann. Cas. 1916A, 806; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256; Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377; Com. v. Anderson, 272 Mass. 100, 172 N. E. 114, 69 A.L.R. 1097; Pfeiffer v. Board of Education, 118 Mich. 560, 77 N. W. 250, 42 L.R.A. 536; Kaplan v. Independent School Dist. 171 Minn. 142, 214 N. W. 18, 57 A.L.R. 185; Franta v. Bohemian Roman Catholic Cent. Union, 164 Mo. 304, 63 S. W. 1100, 54 L.R.A. 723, 86 Am. St. Rep. 611; State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N. W. 999, 50 L.R.A.(N.S.) 1182; State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L.R.A. 927; Board of Education v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233; McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292; People v. Cole, 219 N. Y. 98, 113 N. E. 790, L.R.A.1917C, 816; Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422; Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821; Pirkey Bros. v. Com. 134 Va. 713, 114 S. E. 764, 29 A.L.R. 1290; State ex rel. Conway v. Joint School Dist. 162 Wis. 482, 156 N. W. 477, L.R.A.1916D, 399, Ann. Cas. 1918C, 584; State ex rel. Weiss v. District Bd. 76 Wis. 177, 44 N. W. 967, 7 L.R.A. 330, 20 Am. St. Rep. 41.

Note to Davis v. Beason, 133 U. S. 648, 33 L. ed. 642, 10 S. Ct. 302.

[12] State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224, overruled on another point in State v. Baum, 33 La. Ann. 981.

"The Constitutions of every state in the Union contain provisions similar to those found in the Constitution of Georgia, and practically all of them, though varying in language, contain the three elements of religious freedom of conscience, freedom of the civil status on account of religion, and freedom from taxation for sectarian purposes. All of these draw their inspiration from a common source." Wilkerson v. Rome, 152 Ga. 762, 110 S. E. 895, 20 A.L.R. 1334.

"We do not think there is good reason for making fine distinctions between the constitutional provisions of the different states, aimed to secure and protect religious liberty. It is, no doubt, true that, at the time the original states adopted their Constitutions, society was more permeated by intolerance tending to active persecution of those deviating in religious views and practices from the majority than has been the case later in our history when this state adopted its Constitution. Although most of the early settlers came here to escape religious persecution, they themselves, at times, became persecutors. In framing state Constitutions, however, the idea was dominant to protect religious liberty. Divine worship according to the dictates of the individual conscience was deemed essential to the welfare of every person and of importance to the state, by the peoples of every state. The main purpose was to protect the sincere worshipper, no matter of what sect, against persecution, to prohibit the majority from using the government in any form to further any sect or church, or coerce any citizen into any religious views or practice. It may be true that some Constitutions indicate what particular act infringes religious liberty, and when it does it must be given effect." Kaplan v. Independent School Dist. 171 Minn. 142, 214 N. W. 18, 57 A.L.R. 185.

As distinguished from the religions of

fined in the Constitution.[13] In order to ascertain its meaning, one must refer to other sources, and no source is more appropriate than the history of the period during which the provision for the protection of religious liberty was adopted.[14] The Supreme Court has stated that the term "religion" has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for his being and character and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.[15] Religion in its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition and imposing rules of conduct, with future rewards and punishments.[16] Included in the right to religious liberty is the right of the parent to instruct and guide his own children in religious training.[17]

Touching religion, there is a doubtful zone which legislation should be most reluctant to enter. The founders of the Nation recognized it when they placed the great guaranty of religious liberty in the Constitution of a free people, and it is for every court to see that that liberty is not encroached upon or that freedom gnawed and impaired by any experimental legislation, however well meant. So, when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation. In accordance with the dictate of the Constitution itself, the doubt will be resolved in favor of religious liberty.[18] Nevertheless, in order to violate the constitutional right to religious freedom, a statute must work an establishment of a religion, provide for compulsory support, by taxation or otherwise, of religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief.[19] A man, although constrained to enter a house of worship belonging to a different sect from the one with which he affiliates, is not compelled to worship God contrary to the dictates of his conscience if no sectarian services are carried on.[20] Under the constitutional guaranty of religious liberty, a municipal corporation cannot arbitrarily say who may or may not engage in charitable work dependent wholly or in part on voluntary contributions from the public.[1] Legislation, however, forbidding the solicitation of alms for a charitable purpose upon the public streets by anyone who has not obtained a permit to do so does not interfere with religious liberty.[2] The exemptions from military service in

Confucius, Gautama, Mohammed, or even Abram, it may be truly said that by reason of the number, influence, and station of its devotees within our territorial boundaries, the religion of Christ is the prevailing religion of this country. State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871.

13 Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377.

14 Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

15 Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377.

16 McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292.

17 Knowlton v. Baumhover, 182 Iowa, 691, 166 N. W. 202, 5 A.L.R. 841.
For a treatment of the question as to whether reading the Bible in the schools violates the constitutional guaranty of religious liberty, see SCHOOLS [Also 24 R. C. L. p. 657, §§ 115 et seq.].

18 Re Dart, 172 Cal. 47, 155 P. 63, L.R.A. 1916D, 905, Ann. Cas. 1917D, 1127.

19 State ex rel. Temple v. Barnes, 22 N. D. 18, 132 N. W. 215, 37 L.R.A.(N.S.) 114, Ann. Cas. 1913E, 930.

20 State ex rel. Conway v. Joint School Dist. 162 Wis. 482, 156 N. W. 477, L.R.A. 1916D, 399, Ann. Cas. 1918C, 584.
The constitutional prohibition against compelling attendance at a place of worship and interference with the rights of conscience is not infringed by holding the graduating exercises of a public school in a church and permitting a clergyman to deliver a nonsectarian invocation in connection with them. Ibid.

1 Re Dart, 172 Cal. 47, 155 P. 63, L.R.A. 1916D, 905, Ann. Cas. 1917D, 1127.

2 State v. Hundley, 195 N. C. 377, 142 S. E. 330, 57 A.L.R. 506.

the strict sense made by the Selective Draft Act of 1917, in favor of the members of religious sects as enumerated, whose tenets exclude the moral right to engage in war, did not violate the prohibition against the establishment of a religion or an interference with the free exercise thereof.[3] A statute and a rule of a school committee requiring pupils in public schools to salute the flag and recite a pledge of allegiance do not violate constitutional guaranties of religious freedom.[4] Forbidding the teaching in the public schools of the theory that man has descended from lower forms of animals does not violate a constitutional provision that no preference shall be given to any religious establishment or mode of worship.[5]

While laws cannot interfere with mere religious belief and opinions, they may inhibit acts or practices which tend toward the subversion of the civil government[6] or which are made criminal by the law of the land.[7] Police measures may be adopted, if they do not affect merely beliefs and especially if the actions so affected are not of a religious character, even though conscientiously believed to be so, but are rather of a purely secular nature.[8] Thus, the constitutional right to religious liberty is not infringed by requiring a certificate of freedom from venereal disease as a condition of marriage;[9] by requiring one seeking admission to a public school to furnish a physician's certificate as to his physical condition;[10] by adopting reasonable regulations applicable to the sale of religious books and pamphlets;[11] by forbidding the practice of spirit communicating with departed spirits by a medium;[12] or by the casting and reading of horoscopes of members of an astrological society.[13] Constitutional provisions securing freedom of worship are not designed to prevent the adoption of reasonable rules for the use of streets; and a religious

3 Kramer v. United States, 245 U. S. 478, 62 L. ed. 413, 38 S. Ct. 168; Jones v. Perkins, 245 U. S. 390, 62 L. ed. 358, 38 S. Ct. 166; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, 38 S. Ct. 159, L.R.A.1918C, 361, Ann. Cas. 1918B, 856.
Annotation: 7 B. R. C. 600.
The guaranty of religious freedom contained in § 116 of the Constitution of Australia, that the Commonwealth shall not make any law prohibiting the free exercise of any religion, was not violated by the provisions of the Defense Act 1903–1910 imposing obligations on all male inhabitants with respect to military training. Krygger v. Williams, 15 C. L. R. (Austr.) 366, 7 B. R. C. 586.

4 Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377.
Annotation: 110 A.L.R. 383.

5 Scopes v. State, 154 Tenn. 105, 289 S. W. 363, 53 A.L.R. 821.

6 Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Nicholls v. Lynn, — Mass. —, 7 N. E. (2d) 577, 110 A.L.R. 377; State v. Big Sheep, 75 Mont. 219, 243 P. 1067, citing R. C. L.
Annotation: 2 L.R.A.(N.S.) 536.

7 Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; State v. Big Sheep, 75 Mont. 219, 243 P. 1067, citing R. C. L.; State v. Neitzel, 69 Wash. 567, 125 P. 939, 43 L.R.A.(N.S.) 203, Ann. Cas. 1914A, 899.
Blasphemy is not within the protection of the constitutional guaranty of religious liberty. State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871.

8 Com. v. Herr, 229 Pa. 132, 78 A. 68, Ann. Cas. 1912A, 422.
Annotation: Ann. Cas. 1912A, 428.
Laws are made for the government of actions, and, while they cannot interfere with mere religious beliefs, they may with practices. McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292.

9 Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L.R.A.(N.S.) 778, Ann. Cas. 1916B, 1040.

10 Streich v. Board of Education, 34 S. D. 169, 147 N. W. 779, L.R.A.1915A, 632, Ann. Cas. 1917A, 760.
As to the requirement of vaccination before being permitted to attend schools, see SCHOOLS [Also 24 R. C. L. p. 631, § 89].

11 Com. v. Anderson, 272 Mass. 100, 172 N. E. 114, 69 A.L.R. 1097.

12 McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292.
Annotation: 29 A.L.R. 297.
The regulation or suppression of the art, practice, or profession of communicating with departed spirits by a person known as a "medium" while in a state of trance, who imparts such communications for hire, whether it is done pursuant to a system of philosophy, religion, legerdemain, or metaphysical science, is within the police power of the state. McMasters v. State, 21 Okla. Crim. Rep. 318, 207 P. 566, 29 A.L.R. 292.

13 State v. Neitzel, 69 Wash. 567, 125 P. 939, 43 L.R.A.(N.S.) 203, Ann. Cas. 1914A, 899.

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body cannot avail itself of these provisions as an authority to take possession of a city street, in violation of such rules, for the purpose of public worship therein.[14] Prohibiting one from curing the sick for hire by means of prayer does not deprive him of the constitutional right of the free exercise and enjoyment of religious profession and worship.[15]

Wrong practiced in the name of religion is not protected by the Constitution providing for the free exercise and enjoyment of religious profession and worship.[16] The fact that an act is done only as a matter of religious worship will not protect a person from the consequences if such an act has been prohibited by law.[17] Accordingly, the Supreme Court of the United States has announced the general principle that the punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, such, for example, as polygamy or bigamy, cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[18]

§ 313. To Bear Arms.—The right of bearing arms for a lawful purpose is not a right granted by the Federal Constitution and such right is not in any manner dependent upon that instrument for its existence. The Second Amendment to the Constitution of the United States in declaring that it shall not be infringed means no more than that this right shall not be infringed by Congress.[19] Accordingly, a state statute prohibiting the carrying of dangerous weapons does not abridge any constitutional privileges or immunities of citizens of the United States.[20] The Second Amendment should be construed with reference to the provisions of the common law upon this subject as they then existed and in consonance with the reason and spirit of the amendment itself as defined in what may be called its "preamble."[1]

There are provisions in the Bills of Rights in many of the states to the effect that every citizen has the right to bear arms.[2] In some states the right is of the same nature, but the class to which it extends is broader since every person is guaranteed the right.[3]

14 Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L.R.A. 142, 12 Am. St. Rep. 566.

15 Post v. United States (C. C. A. 5th) 135 F. 1, 1022, 70 L.R.A. 989; Smith v. People, 51 Colo. 270, 117 P. 612, 36 L.R.A.(N.S.) 158; People v. Cole, 219 N. Y. 98, 113 N. E. 790, L.R.A.1917C, 816; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L.R.A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898.

The constitutional guaranty of religious freedom is not violated by a statute requiring the furnishing of medical attendance to minors, where the Constitution provides that liberty of conscience shall not justify practices inconsistent with the safety of the state. People v. Pierson, 176 N. Y. 201, 68 N. E. 243, 63 L.R.A. 187, 98 Am. St. Rep. 666.

16 People v. Cole, 219 N. Y. 98, 113 N. E. 790, L.R.A.1917C, 816.

17 Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 S. Ct. 792; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Com. v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L.R.A. 142, 12 Am. St. Rep. 566.

18 Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 S. Ct. 792; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244. See BIGAMY, Vol. 7, p. 750, § 4, p. 752, § 7, p. 766, § 29.

19 Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 S. Ct. 874; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Strickland v. State, 137 Ga. 1, 72 S. E. 260, 36 L.R.A.(N.S.) 115, Ann. Cas. 1913B, 323; State v. Keet, 269 Mo. 206, 190 S. W. 573, L.R.A.1917C, 60.

Annotation: 14 L.R.A. 601; 3 L.R.A.(N.S.) 169, s. L.R.A.1917C, 63; 115 Am. St. Rep. 196; 1 Ann. Cas. 56; Ann. Cas. 1913B, 333.

20 Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 S. Ct. 874; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580.

1 State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L.R.A. 600.

2 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 7 Ann. Cas. 925; State v. Keet, 269 Mo. 206, 190 S. W. 573, L.R.A.1917C, 60.

Annotation: 3 L.R.A.(N.S.) 168; 115 Am. St. Rep. 196; 7 Ann. Cas. 927.

3 People v. Zerillo, 219 Mich. 635, 189 N. W. 927, 24 A.L.R. 1115 (alien held protected).

The legislature cannot, under the guise of protection of game, disarm any class falling within the constitutional guaranty of the right to bear arms in defense of themselves. Ibid.

4 Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 7 Ann. Cas. 925.

Annotation: 3 L.R.A.(N.S.) 168.

5 Annotation: 3 L.R.A.(N.S.) 168.

6 State v. Hogan, 63 Ohio St. 202, 58 N. E. 572, 52 L.R.A. 863, 81 Am. St. Rep. 626.

Annotation: 20 L.R.A.(N.S.) 1007.

7 Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51.

8 State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; Haile v. State, 38 Ark. 564, 42 Am. Rep. 3; Fife v. State, 31 Ark. 455, 25 Am. Rep. 556; Carroll v. State, 28 Ark. 99, 18 Am. Rep. 538; Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 7 Ann. Cas. 925 (forbidding carrying of weapons, without limiting the abridgment to concealed weapons); State v. Chandler, 5 La. Ann. 489, 52 Am. Dec. 599; People v. Brown, 253 Mich. 537, 235 N. W. 245, 82 A.L.R. 341; State v. Wilforth, 74 Mo. 528, 41 Am. Rep. 330; State v. Wilburn, 7 Baxt. (Tenn.) 57, 32 Am. Rep. 551; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; English v. State, 35 Tex. 473, 14 Am. Rep. 374; State v. Workman, 35 W. Va. 367, 14 S. E. 9, 14 L.R.A. 600.

Annotation: 14 L.R.A. 600; 3 L.R.A.(N.S.) 169, s. 20 L.R.A.(N.S.) 1007, 36 L.R.A.(N.S.) 115, and L.R.A.1917C, 63; 1 Ann. Cas 56; 7 Ann. Cas. 927; 17 Ann. Cas. 570; Ann. Cas. 1913B, 333.

The Constitution, in declaring that every citizen has the right to bear arms in defense of himself and the state, has neither expressly nor impliedly denied to the legislature the right to enact laws in regard to the manner in which arms shall be borne. State v. Keet, 269 Mo. 206, 190 S. W. 573, L.R.A.1917C, 60.

As to the crime of carrying concealed weapons, see WEAPONS.

9 Salina v. Blaksley, 72 Kan. 230, 83 P. 619, 3 L.R.A.(N.S.) 168, 115 Am. St. Rep. 196, 7 Ann. Cas. 925; State v. Smith, 11 La. Ann. 633, 66 Am. Dec. 208; Ex parte Thomas, 21 Okla. 770, 97 P. 260, 20 L.R.A.(N.S.) 1007, 17 Ann. Cas. 566; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; English v. State, 35 Tex. 473, 14 Am. Rep. 374.

Annotation: 17 Ann. Cas. 570.

10 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; Haile v. State, 38 Ark. 564, 42 Am. Rep. 3; Re Brickey, 8 Idaho, 597, 70 P. 609, 101 Am. St. Rep. 215, 1 Ann. Cas. 55; Fife v. State, 31 Ark. 455, 25 Am. Rep. 566; Re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51; Ex parte Thomas, 21 Okla. 770, 97 P. 260, 20 L.R.A.(N.S.) 1007, 17 Ann. Cas. 566; Pierce v. State, 42 Okla. Crim. Rep. 272, 275 P. 393, 73 A.L.R. 833; State v. Wilburn, 7 Baxt. (Tenn.) 57, 32 Am. Rep. 551.

Annotation: 14 L.R.A. 601; 3 L.R.A.(N.S.) 169, s. L.R.A.1917C, 63, 64; 1 Ann. Cas. 56; 17 Ann. Cas. 571; Ann. Cas. 1913B, 333.

A state may prohibit the practice of carrying concealed weapons without violating a constitutional provision "that the right of no citizen to keep and bear arms in defense of his home, person, and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons." State v. Keet, 269 Mo. 206, 190 S. W. 573, L.R.A.1917C, 60.

11 **In Kentucky, contrary to the view taken elsewhere,** it was once held that any

The contention has been made that provisions of this character in a Bill of Rights are constitutional inhibitions upon the power of the legislature to prohibit the individual from having and carrying arms.[4] The right to keep and bear arms has been frequently characterized as the palladium of the liberties of the people, and any absolute prohibition of such right would undoubtedly be unconstitutional.[5] In the majority of jurisdictions it is recognized that the constitutional right to bear arms is intended to guarantee such rights to the people and to afford the citizen a means for the defense of himself and his property;[6] that right is limited to bearing of arms in defense of a common cause, and not to their use in private brawls or affrays.[7] It has, however, been generally held that the legislature may regulate the mode of carrying deadly weapons,[8] especially as to such weapons as are not ordinarily used in warfare.[9] Thus, a statute may prohibit the carrying of any pistols such as are usually carried concealed upon the person, without in any way affecting the right to carry those weapons which are ordinarily used in warfare, and therefore it has been held that such a law does not infringe a constitutional privilege of the citizen to bear arms.[10] The doctrine of these cases was not everywhere accepted, however, for in one jurisdiction the court held that acts of the legislature prohibiting the carrying of concealed weapons were clearly in violation of provisions of the Bill of Rights of the form referred to above.[11] In some jurisdictions the validity of the statute depends upon the

factor whether the weapons forbidden to be carried are concealed.[12] A statute, however, which under the pretense of regulating amounts to a destruction of the right or which requires arms to be so borne as to render them wholly useless for purposes of defense, is clearly unconstitutional.[13]

§ 314. Militia.—The Bill of Rights of the United States Constitution provides that the right to a well-regulated militia shall not be infringed. This provision in the Second Amendment is only a limitation upon the powers of Congress and the National Government, and not upon the states.[14]

The people well remembered the outrages occasioned by the thrusting of armed troops into their homes and provided in the Third Amendment that no soldier in peace times shall be quartered in any house without the owner's consent or even in time of war except in a manner provided by law.

§ 315. Against Unreasonable Search and Seizure.—One of the safeguards which the American people had brought with them from England was the right to be free from unreasonable search and seizure which would amount to an invasion of the privacy and home of the citizen and seizure of private papers. Before the Revolution, this right had been abridged by the notorious writs of assistance. When the new Constitution was formulated, the memory of the outrages incurred by the violation of this right was fresh in the minds of the people, and in order to insure themselves from any recurrence of such injustice, the Bill of Rights in the Federal Constitution, in which the Fourth Amendment was inserted, provides generally against unreasonable searches and seizures. This amendment is only a limitation on Federal powers, but the Constitutions of the several states contain similar provisions.[15]

§ 316. Criminal Cases.—The Bill of Rights in the Federal Constitution contains many guaranties against oppressive proceedings in criminal prosecutions. The Fifth Amendment provides generally the right to be met by indictment of a grand jury if charged with a capital or otherwise infamous crime. It also contains the famous Anglo-American concept of justice that no person shall twice be put in jeopardy for the same offense. Further security against oppression is bulwarked by the provision that no person shall be compelled in any criminal case to be a witness against himself. These rights are discussed in detail in other articles.[16] The foregoing provisions of the Federal Bill of Rights, however, apply only to the United States. In no manner are these provisions limitations on the states.[17] The various state Constitutions

restraint on the right of citizens to bear arms was unconstitutional and that the right was violated by an act preventing the carrying of concealed weapons. Bliss v. Com. 2 Litt. (Ky.) 90, 13 Am. Dec. 251. A later constitutional provision, however, expressly gives the general assembly the right to prevent persons from carrying concealed weapons. Annotation: 3 L.R.A. (N.S.) 169.

[12] Re Brickey, 8 Idaho, 597, 70 P. 609, 101 Am. St. Rep. 215, 1 Ann. Cas. 55, holding that the legislature has power to prohibit the carrying of concealed deadly weapons, but has no power to prohibit absolutely the carrying of deadly weapons in any manner whatsoever in cities, towns, and villages.

Annotation: 1 Ann. Cas. 56.

A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state, but not a statute which prohibits carrying them in any manner. State v. Keet, 269 Mo. 206, 190 S. W. 573, L.R.A. 1917C, 60.

[13] State v. Wilforth, 74 Mo. 528, 41 Am. Rep. 330.

[14] See Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580.

As to cognate right to bear arms, see supra, § 313.

As to militia generally, see MILITARY [Also 18 R. C. L. p. 1052, §§ 47 et seq.].

[15] See SEARCH AND SEIZURE [Also 24 R. C. L. p. 702, §§ 4 et seq.].

[16] See CRIMINAL LAW: INDICTMENTS AND INFORMATIONS; WITNESSES [Also 28 R. C. L. p. 423, §§ 8 et seq.].

[17] See CRIMINAL LAW; WITNESSES [Also 28 R. C. L. p. 423, § 8].

also generally contain the same guaranties.[18] In connection with the constitutional guaranty against self-incrimination, it has been repeatedly held, both under the Federal and under state Constitutions, that this right is to be broadly construed, and not only applies to the accused in a criminal proceeding, but is a common shield available to all persons summoned as witnesses, although in a majority of jurisdictions it is not available to corporations.[19]

The Sixth Amendment to the Federal Constitution also contains many stipulations as to the rights of the accused in criminal matters, such as the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; the right to counsel for his defense.[20] Although these provisions, as a general rule, operate only upon the United States in Federal prosecutions, usually being inapplicable to state criminal proceedings,[1] the same rights, privileges, and immunities are generally secured by the various state Constitutions.[2] Because the right to counsel for defense and the right to be adequately represented in a criminal case are fundamental, in accordance with the general rule that a right included in the fundamental principles of liberty and justice is safeguarded from state infringement by the due process clause of the Fourteenth Amendment,[3] in order to afford an accused a trial consistent with due process, the state must allow the accused a fair opportunity to secure counsel of his own choice, and in a capital case, if the defendant is unable to employ counsel or is incapable of adequately making his own defense, the state court must assign counsel for him, and the appointment must be effective.[4]

The Eighth Amendment also carefully safeguards the accused. It affords security against excessive bail,[5] excessive fines, and cruel and unusual punishment.[6] This amendment does not operate as a limitation upon the states, but the state Constitutions generally contain the same or similar provision.[7]

§ 317. Trial by Jury in Civil Cases.—The right to trial by jury is one of the oldest concepts of personal liberty in our system of general jurisprudence. It had been brought to this country by the people when they came from England and was firmly engrafted in their ideas of justice. When the Constitution of the United States was amended to include the Bill of Rights, the people by virtue of the Seventh Amendment secured from general encroachment the right to trial by jury in all actions at common law in the Federal courts where the value in controversy exceeds $20. The amendment also provides that no fact tried by a jury shall be re-examined in the United States Courts except in conformity to the rules of the common law. Although this amendment is not a limitation on the states, and does not affect litigation in the state courts, each state has provisions in its Constitution securing generally the right to trial by jury in common-law actions.[8]

[18] The reader should consider carefully the provisions of his local state Constitution.

[19] See WITNESSES [Also 28 R. C. L. p. 423, §§ 8 et seq.].

[20] See CRIMINAL LAW.

[1] See CRIMINAL LAW.

[2] See People v. Cooper, 366 Ill. 113, 7 N. E. (2d) 882, 110 A.L.R. 223 (as to right to counsel).

Always refer to the provisions of the local Constitution.

[3] See supra, § 311.

[4] Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527. See also People v. Cooper, 366 Ill. 113, 7 N. E. (2d) 882, 110 A.L.R. 223.

[5] See generally BAIL AND RECOGNIZANCE, Vol. 6, p. 74, §§ 59 et seq.

[6] See CRIMINAL LAW.

[7] See BAIL AND RECOGNIZANCE, Vol. 6, p. 74, § 59; CRIMINAL LAW.

Consult the local Constitution.

[8] Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 67 L. ed. 961, 43 S. Ct. 589; Chicago, R. I. & P. R. Co. v. Cole, 251 U. S.

§ 318. Compensation for Property Taken.—The people have protected not only their persons from unreasonable treatment by governmental authority by virtue of the Bills of Rights, but also their property. By virtue of the Fifth Amendment to the Federal Constitution and the provisions of the various state Constitutions, it was early provided that the Federal, state, and local governments could not take private property for public use without just compensation. This power is further governed as to both the Federal and state authority by the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, as well as the provisions of the various state Constitutions, that no person shall be deprived of his property without due process of law. Although there was at one time some question as to the applicability of the Fourteenth Amendment to limit the powers of the state even though all the requirements of the state Constitution may be complied with, it clearly applies where the taking is for a private use or without just compensation, and in eminent domain proceedings to insure the landowner in any case of due process in any procedure under which his land is taken.[9]

b. Fundamental Civil and Social Liberty

§ 319. Freedom of Speech.—The Constitution of the United States and the Bills of Rights of many of the states contain prohibitions against the enactment of laws which would abridge the freedom of speech or of the press.[10] It has been held, consistent with the general rule as to the First Eight Amendments to the Federal Constitution,[11] that the First Amendment limiting congressional abridgment of such rights is not applicable to state action.[12] The modern view, however, is that the same fundamental principles which are contained in that amendment protect the rights there enumerated from any state abridgment by virtue of the due process clause of the Fourteenth Amendment.[13] In a fairly early case, Justice Holmes stated that the Supreme Court would leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First.[14] By virtue of later decisions of the Supreme Court, the rule has become firmly settled that the right of freedom of speech and of the press, which is protected by the

54, 64 L. ed. 133, 40 S. Ct. 68; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. ed. 487; Pervear v. Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608.

See Jury [Also 16 R. C. L. p. 181, § 2, p. 192, §§ 13 et seq.].

The reader should consult the provisions of his local state Constitution.

9 See infra, Vol. 12, Subd. XIV.

See Eminent Domain [Also 10 R. C. L. p. 16, §§ 14 et seq.].

10 Corliss v. E. W. Walker Co. (C. C.) 57 F. 434, 64 F. 280, 31 L.R.A. 283; State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515; Layne v. Tribune Co. 108 Fla. 177, 146 So. 234, 86 A.L.R. 466; Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A.1917D, 192, Ann. Cas. 1918B, 936; Robison v. Hotel & R. Employees, 35 Idaho, 418, 207 P. 132, 27 A.L.R. 642; Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A.1917E, 383; State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A.L.R. 1527; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 346.

Annotation: 15 Ann. Cas. 3; Ann. Cas. 1915B, 1183.

11 See supra, § 310.

12 Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; State v. Mockus, 120 Me. 84, 113 A. 33, 14 A.L.R. 871; State v. Haffer, 94 Wash. 136, 162 P. 45, L.R.A.1917C, 610, Ann. Cas. 1917E, 229.

Annotation: 15 Ann. Cas. 3.

13 See cases cited infra, notes 15, 16, this section.

14 Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

First Amendment from abridgment by Congress, is among the fundamental rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.[15] One of the state courts had earlier taken a similar position, although its concept is even broader, for it included free speech and free press within the entire scope of due process instead of merely within "liberty." The basis of this theory is that the right of free speech is impliedly guaranteed in constitutional provisions that no person may be deprived of life, liberty, or property without due process of law, in accordance with the principle that the words "life," "liberty," and "property" are representative terms and cover every right to which a member of the body politic is entitled under the law, including the right of freedom of speech.[16] Freedom of speech and freedom of the press are such intimate elements of liberty that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law.[17] It has even been held by one court that these rights cannot lawfully be surrendered to another by a citizen and cannot lawfully be infringed, even momentarily, by individuals, any more than by the state itself, and least of all can they be breached by corporations and unincorporated associations which function only by grace of the state.[18]

Many of the Colonies, which afterwards became states in our Union, had similar provisions guaranteeing freedom of speech and of the press in their charters or in Bills of Rights, which were part of their fundamental laws, and it is generally considered that all such provisions have the same general meaning,[19] which is one based primarily upon the law of England.[20] These guaranties were intended generally to put an end to restraints and limitations which at one time in English history had been imposed on the right of public speaking and writing.[1] The underlying safeguard of the constitutional provision for freedom of the press or speech is "that opinion is free and conduct alone is amenable to the law."[2]

The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write, and such rights, as well as the right of

15 De Jonge v. Oregon, 299 U. S. 356, 81 L. ed. 278, 57 S. Ct. 255; Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444; Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 A.L.R. 527; Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Fiske v. Kansas, 274 U. S. 380, 71 L. ed. 1108, 47 S. Ct. 655; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641 (concurring opinion of Brandeis, J.); Gitlow v. New York, 263 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625 (in which the court said: "We do not regard the incidental statement in Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question"); Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314.

See the article by Charles Warren "The New Liberty under the Fourteenth Amendment," 39 Harvard L. Rev. 431.

16 Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440.

Annotation: 15 Ann. Cas. 5.

See infra, § 328.

17 Schaefer v. United States, 251 U. S. 466, 64 L. ed. 360, 40 S. Ct. 259.

18 Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443.

19 Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

As to liberty of the press, see infra, § 320.

20 Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

Annotation: 32 L.R.A. 829.

1 People v. Steelik, 187 Cal. 361, 203 P. 78, citing R. C. L.; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; State v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839.

2 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296.

The constitutional guaranty forbids the passage of legislation penalizing the membership in organizations or the promotion of utterances which seek changes in government by peaceful means rather than by subversion or by destruction through force. State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A.L.R. 1527. Annotation: 20 A.L.R. 1541.

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privacy, or the right to speak only when one may speak freely, are insured under this constitutional provision. A statute which requires an employer of labor, upon request of a discharged employee, to furnish in writing the true cause or reason for such discharge has been held to be coercive of this right and repugnant to a constitutional provision as to the freedom of speech in a Bill of Rights, and therefore is invalid.[3] Elsewhere, however, it has been held that a statute requiring the giving of clearance cards to employees leaving the service of corporations does not interfere with the constitutional right of free speech.[4]

Many regulatory measures surrounding the election laws have been attacked, with varying results, on the theory that they violate these constitutional guaranties.[5] A statute requiring a report of a civic league, upon a candidate for public office, to state in full all the facts on which it is founded, together with the names and addresses of the persons furnishing it, violates the Constitution.[6] A statute making it unlawful for a judge, superintendent of schools, and other specified officers to participate actively in politics by making political speeches or actively or officially participating in political meetings is unconstitutional for similar reasons.[7] Generally, however, statutes forbidding participation in politics by public officers have been held not to violate such constitutional guaranties.[8] A similar holding of validity has been made as to statutes regulating the manner of attack and the time within which charges may be made on political candidates.[9] The various Corrupt Practices Acts have been generally sustained.[10] A statute, however, which goes to the extent of declaring that candidates for judicial and educational offices shall not be nominated, indorsed, recommended, criticized, or referred to in any manner by any political party, convention, or primary violates such constitutional provisions.[11]

§ 320. Liberty of Press.—The constitutional guaranty of liberty of the press is one of the strongest bulwarks of liberty.[12] The newspapers, magazines, and other journals of the country have shed and continue to shed more light on the public and business affairs of the nation than any other form of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded

[3] Atchison, T. & S. F. R. Co. v. Brown, 80 Kan. 312, 102 P. 459, 23 L.R.A.(N.S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108.

Annotation: 27 A.L.R. 40; 66 L. ed. 1046; L.R.A.1917B, 1115.

[4] Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27, affirming (Mo.) 192 S. W. 387, L.R.A. 1918A, 166.

Annotation: 27 A.L.R. 40, 41; 66 L. ed. 1045.

[5] For a general discussion of offenses against election laws, see ELECTIONS [Also 9 R. C. L. p. 1175, §§ 163 et seq.].

[6] Re Harrison, 212 Mo. 88, 110 S. W. 709, 16 L.R.A.(N.S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1.

Annotation: 15 Ann. Cas. 9.

[7] Louthan v. Com. 79 Va. 196, 52 Am. Rep. 626.

Annotation: 69 A.L.R. 384; 32 L.R.A. 831; 15 Ann. Cas. 9.

[8] Duffy v. Cooke, 239 Pa. 427, 86 A. 1076, Ann. Cas. 1915A, 550.

Annotation: 15 Ann. Cas. 8, 9; Ann. Cas. 1915B, 1185.

[9] Ex parte Hawthorne, 116 Fla. 608, 156 So. 619, 96 A.L.R. 572.

Annotation: 96 A.L.R. 582.

[10] Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

Annotation: 69 A.L.R. 379, 383, 384.

A Corrupt Practices Act declaring it to be a corrupt practice for any person to give or offer money or other valuable thing to an elector with intent to induce him to vote for any candidate for public office does not contravene a constitutional provision against impairment of freedom of speech. Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474.

[11] State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839.

Annotation: Ann. Cas. 1915B, 1135.

[12] Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285.

by a free press cannot be regarded otherwise than with grave concern. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to be fetter ourselves.[13] The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.[14]

The freedom of the press consists largely of the right, without any previous license or censorship, to publish the truth with good motives and for justifiable ends, whether it respects government, magistracy, or individuals.[15] The primary meaning of the phrase "liberty of the press," as understood at the time our early Constitutions were framed, was freedom from any censorship of the press and from all such restraints upon publications as had been practiced by monarchical or despotic governments in order to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and as to the duties of their rulers.[16] In an early case the Supreme Court pointed out that the main purpose of the constitutional guaranty of liberty of the press was to prevent all such previous restraints upon publications as had been practiced by other governments.[17] The later view of the court upon the scope and extent of the right is that liberty of the press, historically considered and taken up by the Federal Constitution, has meant principally, although not exclusively, immunity from previous restraints or censorship.[18] It is impossible, however, to concede that by the words "freedom of the press" the framers of the First Amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship, for this abuse had then permanently disappeared from English practice.[19]

In its broadest sense, the phrase "freedom of the press" includes not only exemption from censorship, but security against laws enacted by the legislative department of the government or measures resorted to by either of the

[13] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

[14] Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314. See also De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255.

[15] Masses Pub. Co. v. Patton (C. C. A. 2d) 246 F. 24, L.R.A.1918C, 79, Ann. Cas. 1918B, 999; Dailey v. Superior Ct. 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am. St. Rep. 160; Layne v. Tribune Co. 108 Fla. 177, 146 So. 234, 86 A.L.R. 466; Pavesich v. New England L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Levert v. Daily States Pub. Co. 123 La. 594, 49 So. 206, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356; State ex rel. Olson v. Guilford. 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A. (N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; People v. Most. 171 N. Y. 423, 64 N. E. 175, 58 L.R.A. 509; Cincinnati Gazette Co. v. Timberlake. 10 Ohio St. 548, 78 Am. Dec. 285; Ex parte Meckel, 87 Tex. Crim. Rep. 120, 220 S. W. 81, citing R. C. L.

Annotation: 15 Ann. Cas. 4.

The freedom from previous restraint upon publication implied in the constitutional guaranty of the liberty of the press does not depend on proof of truth. Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625.

[16] Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 S. Ct. 247; Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; State ex rel. Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; Respublica v. Oswald, 1 Dall. (Pa.) 325, 1 L. ed. 155, 1 Am. Dec. 246.

Annotation: 15 Ann. Cas. 4.

[17] Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689.

As to limitations of right, see infra, § 321.

[18] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444; Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625.

[19] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

other branches for the purpose of stifling just criticism or muzzling public opinion.[20]

The provisions of the Constitution of the United States and of the several states guaranteeing the freedom of the press are intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large. Where a private citizen has the right to speak the truth in reference to the acts of government of public officials or of individuals, the press is guaranteed the same right;[1] the press, however, does not possess any immunities not shared by every individual.[2]

The power to suppress newspapers or to prohibit their publication is not within the compass of legislative action by a state, and any law enacted for that purpose is clearly in derogation of the constitutional liberty of the press. Accordingly, it has been held that a city ordinance declaring a certain newspaper to be a public nuisance and prohibiting its circulation within the city limits is unconstitutional and void.[3] A state statute imposing a license tax, based on gross receipts, for the privilege of publishing advertisements in any newspaper, magazine, periodical, or publication, violates the guaranty of liberty of the press where the application of the tax is determined not by the volume of advertisements, but by the extent of the circulation of the publication in which the advertisements are carried, thus showing an express purpose to penalize certain publishers and curtail the circulation of a selected group of newspapers.[4] Quite a different result, however, has been reached as to a statute the controlling purpose of which is to raise revenue to help defray the current expenses of state government and state obligations and which shows no hostility to the press or exhibits any purpose or design to restrain the press.[5] Hence, the imposition of an annual privilege tax on various kinds of business, which happens to include newspapers within its scope, amounting to 1 per cent of the gross proceeds received from publication in the case of such newspapers, is not violative of the freedom of the press.[6]

Under the right of the freedom of speech and of the press, it is generally recognized that the public have a right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional provisions or unless the publication is of such nature as to obstruct or embarrass the court in its administration of the law. This does not, however, include the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pend-

20 Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314; Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, 20 L.R.A.(N.S.) 361, 130 Am. St. Rep. 390; Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A.L.R. 626; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L.R.A. 829, 54 Am. St. Rep. 733.

1 Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

Annotation: 15 Ann. Cas. 4.

2 Edwards v. San Jose Printing & Pub. Soc. 99 Cal. 431, 34 P. 128, 37 Am. St. Rep. 70; Layne v. Tribune Co. 108 Fla. 177, 146 So. 234, 86 A.L.R. 466; Levert v. Daily States Pub. Co. 123 La. 594, 49 So. 206, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356; Aldrich v. Press Printing Co. 9 Minn. 133, Gil. 123, 86 Am. Dec. 84; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Annotation: 15 Ann. Cas. 4.

3 Ex parte Neill, 32 Tex. Crim. Rep. 275, 22 S. W. 923, 40 Am. St. Rep. 776.

4 Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444.

5 Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A.L.R. 314.

6 Ibid.

A state statute imposing, for revenue, annual privilege taxes on various forms of business, measured by the amount of business, is not, as to newspaper publishers, violative of the due process clause of the Fourteenth Amendment as abridging the freedom of the press because it also requires that a license be obtained before engaging or continuing in a business subject to the tax, where no condition except the payment of a fee of $1 is attached to the issuance of a license and the fee, payable but once, is in the nature of a registration fee. Ibid.

ing cause, degrade the tribunal, and impede, embarrass, or corrupt the due administration of justice.[7]

While the liberty of the press under constitutional guaranties may not be altogether restrained, he who abuses the right may nevertheless be held to a civil liability therefor,[8] as, for example, in an action for libel or defamation.[9] These constitutional provisions cannot be made engines of oppression by construing them as restrictions upon the right to sell anything of value, such as a newspaper and newspaper writing, which are the creatures of one's brain, provided society is not made to suffer by the transaction.[10]

§ 321. General and Legislative Limitations on Freedom of Speech and of the Press.—The right or privilege of free speech and publication, guaranteed by the Constitutions of the United States and of the several states, has its limitations.[11] It is not an absolute right,[12] for although limitations are recognized only in exceptional cases,[13] the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language.[14]

The limitations upon the right may arise by implication,[15] but frequently they exist by express provision of the organic law itself, for many of the state Constitutions provide in terms that responsibility shall attach for abuse of the liberty or priviiege so secured.[16] The various state Constitutions, how-

7 Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A. 1917D, 192, Ann. Cas. 1918B. 936.

See CONTEMPT, Vol. 12, §§ 32 et seq.

8 Levert v. Daily State Pub. Co. 123 La. 594, 49 So. 206, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; State v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839.

For constitutional provisions as to liability for abuse of the right, see infra, § 321.

9 See infra, § 321.

10 Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L.R.A. 829, 54 Am. St. Rep. 733.

The constitutional guaranty of the freedom of the press does not restrict the right of the owner of a newspaper on a sale of it to bind himself against editing or being connected with another journal in the same locality. Ibid.

11 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Gilbert v. Minnesota, 254 U. S. 325, 65 L. ed. 287, 41 S. Ct. 125; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 S. Ct. 249; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124; Strickland v. State, 137 Ga. 1, 72 S. E. 260, 36 L.R.A. (N.S.) 115, Ann. Cas. 1913B. 323; Robison v. Hotel & Restaurant Employees, 35 Idaho, 18, 207 P. 132, 27 A.L.R. 642; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B. 1180; State v. Holm, 139 Minn. 267, 166 N. W. 181, L.R.A.1918C, 304; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; Ex parte Harrison, 212 Mo. 88, 110 S. W. 709, 16 L.R.A.(N.S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1; Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A. 271.

Annotation: 32 L.R.A. 829; 15 Ann. Cas. 5; Ann. Cas. 1915B. 1183 et seq.

12 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Schaefer v. United States, 251 U. S. 466, 64 L. ed. 360, 40 S. Ct. 259.

13 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625.

Limitations on liberty of the press are recognized only in exceptional cases, such as publications in time of war which would be a hindrance to national effort, obscene publications, or publications inciting to acts of violence and overthrow by force of orderly government. Ibid.

14 Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625; Gilbert v. Minnesota, 254 U. S. 325, 65 L. ed. 287, 41 S. Ct. 125; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 S. Ct. 249; Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A.L.R. 626.

15 Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326.

Annotation: 15 Ann. Cas. 5.

16 Dailey v. Superior Ct. 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am. St. Rep. 160; People ex rel. Conner v. Stapleton, 18 Colo. 568, 33 P. 167, 23 L.R.A. 787; State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124; Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A.1917D, 192, Ann. Cas. 1918B, 936; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Pave-

ever, so provide without specifying what shall constitute an abuse. It is plain that the intent was to leave the legality of any speech or publication to be determined by common-law principles and statutory declaration of the police power.[17]

The question as to when this right or any right becomes wrong by excess is difficult to determine.[18] The question in every case of the alleged infringement of the constitutional freedom of speech and press is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress or the state has a right to prevent; it is a question of proximity and degree.[19] Thus, in war times Congress may prohibit the use of words which would in many places and in ordinary times be within the freedom of speech protected by the First Amendment, when so used and of such a nature.[20] The safeguarding and fructification of free and constitutional institutions constitute the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right to virtually destroy such institutions; however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing.[1] In every situation, however, the principle must be taken into consideration that the power of the state to abridge freedom of speech is the exception rather than the rule. It must find justification in a reasonable apprehension of danger to organized government; the limitation upon individual liberty must have appropriate relation to the safety of the state.[2]

Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare.[3] In a general way the constitutional liberty grants the right freely to

sich v. New England L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180; State v. Mockus, 120 Me. 84, 113 A. 39, 14 A.L.R. 871; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; Ex parte Harrison, 212 Mo. 88, 110 S. W. 709, 16 L.R.A.(N.S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440; Tipton v. Sands, 103 Mont. 1, 60 P. (2d) 662, 106 A.L.R. 474; Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P. 127, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722; Re Anderson, 69 Neb. 689, 96 N. W. 149, 5 Ann. Cas. 421; State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A.L.R. 1527; People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L.R.A. 509; Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A.L.R. 696; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L.R.A. 648; Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 32 L.R.A. 829, 54 Am. St. Rep. 733; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193; Snayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443; Respublica v. Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402; Ex parte Neill, 32 Tex. Crim. Rep. 275, 22 S. W. 923, 40 Am. St. Rep. 776; Louthan v. Com. 79 Va. 196, 52 Am. Rep. 626; State v. Tugwell, 19 Wash. 238, 52 P. 1056, 43 L.R.A. 717; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

Annotation: 32 L.R.A. 829; 15 Ann. Cas. 5.

The constitutional guaranty of freedom of speech is not encroached upon by affording appropriate remedies for the abuse of the privilege of free speech. Robison v. Hotel & Restaurant Employees, 35 Idaho, 418, 207 P. 132, 27 A.L.R. 642.

17 Annotation: 32 L.R.A. 829.

18 Schaefer v. United States, 251 U. S. 466, 64 L. ed. 360, 40 S. Ct. 259.

19 Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 S. Ct. 247.

20 Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 S. Ct. 247; Dodge v. United States (C. C. A. 2d) 258 F. 300, 7 A.L.R. 1510, writ of certiorari denied in 250 U. S. 660, 63 L. ed. 1194, 40 S. Ct. 10.

1 Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. Ct. 560.

2 Herndon v. Lowry, 301 U. S. 242, 81 L. ed. 1066, 57 S. Ct. 732.

3 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484; Whitney v. California, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann.

utter and publish whatever a citizen may desire and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious, or scandalous in their character so that they become an offense against the public and by their malice and falsehood injuriously affect the character, reputation, or pecuniary interest of individuals.[4] A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.[5]

Many instances appear of limitations of the constitutional liberty of speech or of the press by the express enactment of ordinances or statutes regulating its exercise—as, for example, forbidding the making of public addresses in the public grounds or streets of a city;[6] preventing the sale of magazines on the streets in certain restricted districts of a city;[7] making it unlawful to circulate or distribute printed or written handbills or circulars upon the public streets, sidewalks, or public grounds of a municipality;[8] forbidding by ordinance the use of the sidewalks of a municipal corporation for picketing;[9] or, to cite an instance of a more general character, prohibiting, by means of postal regulations established by Congress, the transmission through the mails of corrupting and injurious publications and articles.[10] In any event it cannot be claimed that under this right the press is free to publish, or any individual is free to utter, libels and slanders,[11] nor is the press free to publish the private

Cas. 689; Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A.1917D, 192, Ann. Cas. 1918B, 936; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

Annotation: 15 Ann. Cas. 8; Ann. Cas. 1915B, 1184.

As to censorship of moving pictures not constituting a violation of freedom of speech, see THEATERS, SHOWS, EXHIBITIONS, AND PUBLIC RESORTS [Also 26 R. C. L. p. 702, § 7].

4 Annotation: Ann. Cas. 1915B, 1183.

5 Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625.

"It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare." State v. Holm, 139 Minn. 267, 166 N. W. 181, L.R.A. 1918C, 304.

The constitutional freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to the protection of him who counsels and encourages the violation of the law as it exists. United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407, 65 L. ed. 704, 41 S. Ct. 352.

6 Davis v. Com. 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731; Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793, 67 L.R.A. 803, 104 Am. St. Rep. 167; Com. v. Davis, 162 Mass. 510, 39 N. E. 113, 26 L.R.A. 712, 44 Am. St. Rep. 389, affirmed in 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731; People ex rel. Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364, 25 A.L.R. 107.

Annotation: 10 A.L.R. 1484, s. 25 A.L.R. 114; 32 L.R.A. 829; 15 Ann. Cas. 10.

7 Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905, 105 A.L.R. 1045.

8 Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

Annotation: 5 Ann. Cas. 423; 15 Ann. Cas. 8.

9 Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Ex parte Stout, 82 Tex. Crim. Rep. 183, 198 S. W. 967, L.R.A.1918C, 277.

Annotation: 35 A.L.R. 1201.

10 Horner v. United States, 143 U. S. 207, 36 L. ed. 126, 12 S. Ct. 407; Re Rapier, 143 U. S. 110, 36 L. ed. 93, 12 S. Ct. 374; Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Masses Pub. Co. v. Patton (C. C. A. 2d) 246 F. 24, L.R.A.1918C, 79, Ann. Cas. 1918B, 999; Warren v. United States (C. C. A. 8th) 183 F. 718, 33 L.R.A.(N.S.) 800; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180.

Annotation: 24 L.R.A. 112; 32 L.R.A. 830; 15 Ann. Cas. 9; Ann. Cas. 1915B, 1186.

See POST OFFICE [Also 21 R. C. L. p. 733, § 5; p. 756, §§ 27 et seq.].

11 Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; Edwards v. San Jose Printing & Pub. Co. 99 Cal. 431, 34 P. 128, 37 Am. St. Rep. 70; Layne v. Tribune Co. 108 Fla. 177, 146 So. 234, 86 A.L.R. 466; Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A.1917D, 192, Ann. Cas. 1918B, 936; Jones v. Townsend, 21 Fla. 431, 58 Am. Rep. 676; Strickland v. State, 137 Ga. 1, 72 S. E. 260, 36 L.R.A.(N.S.) 115, Ann. Cas. 1913B, 323; Storey v. People, 79

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letters[12] or the picture or photograph of anyone.[13] The constitutional guaranty does not permit unrestricted utterance or publication of remarks or literature which is seditious or hostilely subversive, which advocates violent, forceful, or terroristic change,[14] or which is blasphemous[15] or otherwise indecent, immoral, obscene, or harmful.[16] A statute prohibiting creditors or others from threatening to injure the credit or reputation of a debtor by publishing his name as a bad debtor by means of letters or circulars or by advertising a claim against him for sale is not unconstitutional as restricting the freedom of speech or publication.[17]

This constitutional right and liberty is subject to the right of judicial tribunals to punish as for contempt where a publication tends to obstruct the courts in their administration of justice. Accordingly, it is held that a summary punishment as for contempt for an improper and scandalous publication of a newspaper article does not constitute an invasion of the liberty of the press.[18] Similarly, an attorney cannot, under his constitutional right of free speech, slander or defame a court.[19]

Ill. 45, 22 Am. Rep. 158; Riley v. Lee, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358; Levert v. Daily States Pub. Co. 123 La. 504, 49 So. 206, 23 L.R.A.(N.S.) 726, 131 Am. St. Rep. 356; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; State ex rel. Olson v. Guilford, 174 Minn. 457, 219 N. W. 770, 58 A.L.R. 607; Aldrich v. Press Printing Co. 9 Minn. 133, Gil. 123, 86 Am. Dec. 84; Diener v. Star-Chronicle Pub. Co. 230 Mo. 613, 132 S. W. 1143, 33 L.R.A.(N.S.) 216; State ex rel. Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; Kelly v. Independent Pub. Co. 45 Mont. 127, 122 P. 735, 38 L.R.A.(N.S.) 1160, Ann. Cas. 1913D, 1063; Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; Respublica v. Dennie, 4 Yeates (Pa.) 267, 2 Am. Dec. 402; Runkle v. Meyer, 3 Yeates (Pa.) 518, 2 Am. Dec. 393; Williams Printing Co. v. Saunders, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693; State v. Haffer, 94 Wash. 136, 162 P. 45, L.R.A. 1917C, 610, Ann. Cas. 1917E, 229; Sweeney v. Baker, 13 W. Va. 158, 31 Am. Dec. 757.

Annotation: 32 L.R.A. 831; 15 Ann. Cas. 6; Ann. Cas. 1915B, 1184.

[12] Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180.

Because of the guaranty of liberty of the press, the right of privacy does not extend to restraining the publication of the biography of an inventor. Corliss v. E. W. Walker Co. (C. C.) 57 F. 434, 64 F. 280, 31 L.R.A. 283.

[13] Pavesich v. New England Mut. L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

The liberty of the press does not confer on an individual the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will. Ex parte Sturm, 152 Md. 114, 136 A. 312, 51 A.L.R. 356.

[14] For a typical case see Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117, 51 S. Ct. 532, 73 A.L.R. 1484.

See SEDITION, SABOTAGE, ETC.

[15] Annotation: 14 A.L.R. 883; 32 L.R.A. 829; 15 Ann. Cas. 10; Ann. Cas. 1915B, 1183.

See also BLASPHEMY AND PROFANITY, Vol. 8, p. 700, § 7.

[16] Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 S. Ct. 249; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 S. Ct. 326; State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; State v. McCabe, 135 Mo. 450, 37 S. W. 123, 34 L.R.A. 127, 58 Am. St. Rep. 589.

Annotation: 47 A.L.R. 1135 (gambling information); 32 L.R.A. 830; 15 Ann. Cas. 9; Ann. Cas. 1915B, 1183, 1186.

An act making it a penal offense to sell, or offer to sell, lend, or give a paper principally made up of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime, does not violate Conn. Const. Art. 1, § 5, providing that every citizen may freely speak, write, and publish his sentiments on all subjects, or § 6, providing that no law shall be passed to restrain the liberty of speech or of the press. State v. McKee, 73 Conn. 18, 46 A. 409, 49 L.R.A. 542, 84 Am. St. Rep. 124.

The provision of Minn. Const. Art. 1, § 3, that the liberty of the press shall forever remain inviolate, is not infringed by an act forbidding, in the interest of public morals, the publication of the details of criminal executions. State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867, 9 L.R.A.(N.S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351.

[17] State v. McCabe, 135 Mo. 450, 37 S. W. 123, 34 L.R.A. 127, 58 Am. St. Rep. 589.

[18] Toledo Newspaper Co. v. United States, 247 U. S. 402, 62 L. ed. 1186, 38 S. Ct. 560; Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A.1917D, 192, Ann. Cas. 1918B, 936; Dale v. State, 198 Ind. 110, 150 N. E. 781, 49 A.L.R. 647, writ of error dismissed in 273 U. S. 776, 71 L. ed. 886, 47 S. Ct. 332, and 274 U. S. 763, 71 L. ed. 1322, 47 S. Ct. 591; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180; Burdett v. Com. 103 Va. 838, 48 S. E. 878, 68 L.R.A. 251, 106 Am. St. Rep. 916.

See CONTEMPT, Vol. 12, §§ 32 et seq.

[19] Re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271.

§ 322. —Judicial Restraint by Injunction.—Not only is the freedom of speech and of the press protected from infringement by the legislative department,[20] but it is also safeguarded from judicial abridgment.[1] An essential element of the liberty of the press is its freedom from all censorship over what shall be published and exemption from control, in advance, as to what shall appear in print.[2] Consequently, it has been asserted that the right of freedom of speech and the press cannot coexist with the idea of preventing such freedom of speech or of the press by injunction.[3] Thus, the right to boycott has been asserted under the constitutional guaranty of freedom of speech and of the press, and an instance is given where the authority to enjoin persons from exercising freedom of speech peaceably in assistance of a boycott has been vigorously denied.[4] The general rule as to boycotts, however, is to the contrary, and it is now generally held that the right to institute and maintain a boycott cannot be supported under this constitutional guaranty and that no unconstitutional interference with freedom of speech is effected by enjoining a boycott where such injunction is limited to acts of commission and does not seek to enjoin the publication of a mere libel.[5] The general rule denying the right of the judiciary to enjoin a libel[6] has been applied even though the libel tended to interfere with the administration of justice and to deprive an accused person of a fair trial;[7] and it has been held that a court has no power to prohibit the publication of the testimony of the witnesses in a pending case, where the evidence is not obscene.[8] In certain instances, however, the general principle forbidding the issuance of injunctions is limited.[9] Under certain circumstances a publication may be enjoined if it also amounts to a nuisance.[10] Moreover, a court may enjoin a defendant from communicating with the

[20] See supra, § 321.

[1] Annotation: 15 Ann. Cas. 6, 7; Ann. Cas. 1915B, 1184.

[2] Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625; Dailey v. Superior Ct. 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am. St. Rep. 160; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921.

Annotation: 32 L.R.A. 832, 833.

[3] Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440; Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A.1917E, 383; Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 96 P. 127, 18 L.R.A.(N.S.) 707, 127 Am. St. Rep. 722; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193.

Annotation: 6 A.L.R. 973; 32 L.R.A. 833; 15 Ann. Cas. 7; Ann. Cas. 1915B, 1184.

"We are unable to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so." Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A. 1917E, 383.

A statute providing for the abatement as a public nuisance of the business of regularly or customarily publishing, circulating, possessing, selling, or giving away "malicious, scandalous, and defamatory newspaper, magazine, or other periodical," by process of injunction against further publication, unless the owner or publisher shows that the truth was published with good motives and for justifiable ends is, as to the publisher of charges against public officers for neglecting their duty to suppress crime, inconsistent with the constitutional guaranty of liberty of the press. Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625.

[4] Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L.R.A. 951, 90 Am. St. Rep. 440.

Annotation: 15 Ann. Cas. 7.

[5] Gompers v. Bucks Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 31 S. Ct. 492, 34 L.R.A.(N.S.) 874, affirming 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; American Federation of Labor v. Buck's Stove & Range Co. 33 App. D. C. 83, 32 L.R.A.(N.S.) 748; Robison v. Hotel & Restaurant Employees, 35 Idaho, 418, 207 P. 132, 27 A.L.R. 642; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180; Campbell v. Motion Picture Mach. Operators' Union, 151 Minn. 220, 186 N. W. 781, 27 A.L.R. 631; Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

Annotation: 6 A.L.R. 971, s. 16 A.L.R. 240, and 29 A.L.R. 658; 15 Ann. Cas. 7; Ann. Cas. 1915B, 1184.

[6] See supra, note 3, this section.

[7] Dailey v. Superior Ct. 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am. St. Rep. 160; Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921.

[8] Ex parte Foster, 44 Tex. Crim. Rep. 423, 71 S. W. 593, 60 L.R.A. 631, 100 Am. St. Rep. 866.

[9] Schwartz v. Edrington, 133 La. 235, 62 So. 660, 47 L.R.A.(N.S.) 921, Ann. Cas. 1915B, 1180 (enjoining publication of a petition signed under misapprehension and consequently repudiated).

[10] Empire Theatre Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A.1917E, 383 (semble).

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plaintiff's wife and thereby alienating her affections without violating the constitutional guaranty.[11]

§ 323. —Executive Restraint.—Although there is a dearth of authority on the question, it seems that executive restraints on the constitutional right of freedom of speech and of the press are forbidden on the theory that since one is rendered liable for the abuse of the right, no one may suppress in advance the publication of the printed sentiments of another citizen by then assuming to determine the propriety thereof. Hence, the police officers of a municipality cannot suppress the issuance of a newspaper by stopping future publication, although it has published reckless and scurrilous matter in the past.[12]

§ 324. Parliamentary Freedcm.—In some of the states provisions are contained in the Bills of Rights specially guaranteeing the freedom of deliberation, speech, and debate in legislative assemblies.[13] The privilege of members of the British Parliament of having their debates unquestioned, although it was at first denied by the Crown and its exercise was often attended by actual punishment, became in the course of time generally conceded; and even though speeches made in Parliament by a member are to the prejudice of any other person, or calumnious, or hazardous to the public peace, that member must enjoy complete immunity. In the United States this principle is universally recognized, and a speech or debate in either house of the national or of any state legislature cannot be the foundation of any accusation or prosecution, action, or complaint in any court or place whatsoever.[14] Constitutional provisions securing freedom of debate should be construed liberally, so that their full design may be answered. They should be extended to every act resulting from the nature of the member's office, and done in the execution of it, and should exempt him from a liability for everything said or done by him as a representative, whether according to the rules of the house or not; such freedom is particularly the privilege of the individual members rather than of the house as an organized body, and being derived from the will of the people, the individual members are entitled to this privilege, even against the will of the house.[15]

§ 325. Right to Assemble Peaceably and to Petition Government.—The First Amendment to the Federal Constitution provides that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.[16] The right of the people so to assemble for the purpose of petitioning Congress for a redress of grievances or for anything else connected with the powers or the duties of the National Government is an attribute of national citizenship,[17] and thus a right and privilege secured to citizens of the United States by the Constitution.[18] Although the First Amendment itself is merely a limitation against Federal abridgment of the right,[19] the express guaranty that the right shall not be abridged by Congress does not argue exclusion of abridgment of the power by the states. The due process clause of the Fourteenth Amendment prevents any denial of the right by the states.[20] In the Bills of Rights of many of the states are also found provisions asserting the right of the people to assemble and to consult together for the common good and to petition the government for redress of grievances.[1]

The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.[2] The Constitution does not confer the right, but guarantees its free exercise.[3] The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. It is and always has been one of the attributes of citizenship under a free government, and is found wherever civilization exists.[4] The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation with respect to public affairs and to petition for a redress of grievances.[5]

The power of the state to abridge freedom of assembly is the exception rather than the rule. It must find justification in a reasonable apprehension of dan-

11 Ex parte Warfield, 40 Tex. Crim. Rep. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

12 Annotation: 15 Ann. Cas. 8.

13 Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189.

14 Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

15 Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189.

16 De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

17 Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; United States v. Cruikshank, 92 U. S. 542, 28 L. ed. 588; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

It is of course apparent that the purpose of the assembly should have some proper reference to the National Government. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14.

As to attributes of national citizenship generally, see Vol. 12, Subd. XII.

18 Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; Re Quarles, 158 U. S. 532, 39 L. ed. 1080, 15 S. Ct. 959; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394.

An expression of opinion by the electors of a state upon the question whether a provision of the Federal Constitution shall be repealed is an exercise of the right to petition guaranteed by the Federal Constitution. Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 767, 83 A.L.R. 1364.

19 Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 S. Ct. 580; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 538; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

20 Herndon v. Lowry, 301 U. S. 242, 81 L. ed. 1066, 57 S. Ct. 732; De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255.

1 Britton v. Election Comrs. 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115; State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; Yancey v. Com. 135 Ky. 207, 122 S. W. 123, 25 L.R.A.(N.S.) 455; Com. v. Surridge, 265 Mass. 425, 164 N. E. 480, 62 A.L.R. 402; Wheelock v. Lowell, 196 Mass. 220, 81 N. E. 977, 124 Am. St. Rep. 543, 12 Ann. Cas. 1109; State v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A. (N.S.) 839; State v. Butterworth, 104 N. J. L. 579, 142 A. 57, 58 A.L.R. 744; Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443; McKee v. Hughes, 133 Tenn. 455, 181 S. W. 930, L.R.A.1916D, 391, Ann. Cas. 1918A, 459; Love v. Wilcox, 119 Tex. 256, 28 S. W. (2d) 515, 70 A.L.R. 1484; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

2 De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348.

"The principles governing the right of assembly and the right of free speech are the same." State v. Diamond, 27 N. M. 477, 202 P. 988, 20 A.L.R. 1527.

3 Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

4 United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 533; Neelley v. Farr, 61 Colo. 485, 158 P. 453, Ann. Cas. 1918A, 23; Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443; Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

"The right of the people to meet in public places to discuss in open and public manner all questions affecting their substantial welfare, and to vent their grievances, to protest against oppression, economic or otherwise, and to petition for the amelioration of their condition, and to discuss the ways and means of attaining that end, were rights confirmed and guaranteed them by the Magna Charta, Petition of Right, and the Bill of Rights, the mainstay of the British Constitution, and the bases of both our Federal and State Constitutions. Of course, it goes without saying this inestimable boon of liberty was to be enjoyed by the people in a peaceful and law-abiding manner." State v. Butterworth, 104 N. J. L. 579, 142 A. 57, 58 A.L.R. 744.

5 De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Neelley v. Farr, 61 Colo. 485, 158 P. 458, Ann. Cas. 1918A, 23; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

Citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance. McKee v. Hughes, 133 Tenn. 455, 181 S. W. 930, L.R.A.1916D, 391, Ann. Cas. 1918A, 459.

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ger to organized government; the limitation upon individual liberty must have appropriate relation to the safety of the state.[6] Neither state nor Federal officers—whether executive, legislative, or judicial—may assume the power to deny or curtail the right of the people to petition the government.[7] In a jurisdiction in which the question has been actually presented for determination, the court has taken the position that the right cannot be lawfully infringed by individuals, even momentarily, any more than by the state itself.[8] The right of petition, on the other hand, natural and inherent though it is, has never been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout the many centuries that the right of petition has been recognized, it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it.[9] While the state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of the adoption of the Constitution. That right never included the right to attempt to influence the decision of a court through the medium of a petition.[10] Petitions which have been established as part of judicial procedure are the only ones protected by the constitutional right so far as the courts are concerned.[11]

The right to petition is not completely unlimited.[12] Like all other constitutional rights, it is subject to reasonable regulations to preserve and protect the general welfare.[13] It is no more sacred than the right of free speech, and as

6 Herndon v. Lowry, 301 U. S. 242, 81 L. ed. 1066, 57 S. Ct. 732.

The right may be abused by using assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The right itself must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional right of free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. De Jonge v. Oregon, 299 U. S. 353, 81 L. ed. 278, 57 S. Ct. 255.

Consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. Ibid.

It is one of the fundamental principles of the American system of government that the people have the right to discuss their government without fear of being called to account in the courts for their expressions of opinion. Chicago v. Tribune Co. 307 Ill. 595, 139 N. E. 86, 28 A.L.R. 1361.

7 Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

8 Spayd v. Ringing Rock Lodge, 270 Pa. 67, 113 A. 70, 14 A.L.R. 1443.

The constitutional right to petition those invested with the powers of government, being conferred to work out the public welfare rather than to serve private ends, can be neither denied by others nor surrendered by the citizen himself. Accordingly, a corporation bylaw which punishes with expulsion involving forfeiture of property rights an exercise of the right to petition is void. Ibid. Annotation: 14 A.L.R. 1446.

9 Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.

10 Ibid.

11 Ibid.

12 McKee v. Hughes, 133 Tenn. 455, 181 S. W. 930, L.R.A.1916D, 391.

13 State v. Sinchuk, 96 Conn. 695, 115 A. 33, 20 A.L.R. 1515; Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194; State ex rel. La Follette v. Kohler, 200 Wis. 518, 228 N. W. 895, 69 A.L.R. 348; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 691, 20 Ann. Cas. 633; Spriggs v. Clark, 45 Wyo. 62, 14 P. (2d) 667, 83 A.L.R. 1364.

The constitutional right to assemble in an orderly and peaceable manner to consult upon the common good cannot be exercised at times and places and in circumstances in conflict with the enjoyment of other well-recognized rights of individuals or the public, and does not extend to permitting the obstruction of a highway by the assembling of a crowd to hear a speaker from a box in part of the traveled way

there may be an abuse of the right of free speech, so may there be an abuse of the right of petition.[14] It cannot be used as a basis for a defense to an action for damages if the petition submitted under the right is groundless, instigated only by malice, with intention to injure some person.[15]

The application of the constitutional right of assembly and petition has affected, for the most part, political administration and election legislation.[16] It has been held that a political convention is an assemblage within the meaning of constitutional provisions guaranteeing the right of peaceable assembly and petition[17] and that a statute declaring that candidates for judicial and educational offices shall not be nominated, indorsed, recommended, criticized, or referred to in any manner by any political party, convention, or primary violates such constitutional provisions.[18] The right to sign and circulate a petition for the impeachment of a public officer is likewise safeguarded by these constitutional provisions.[19] The right of assemblage, however, does not in any way prevent the enactment of uniform primary laws, under which, in lieu of congregating at caucuses and conventions and selecting delegates to represent them, the voters may assemble at the polls in the different polling places and there express their choice of candidates.[20]

§ 326. Free Justice and Open Courts; Remedy for All Injuries.—In most of the state Constitutions there are provisions, varying slightly in terms, which stipulate that justice shall be administered to all without delay or denial, without sale or prejudice, and that the courts shall always be open to all alike.[1] These provisions are based largely upon the Magna Charta, chap.

used for vehicles. Com. v. Surridge, 265 Mass. 425, 164 N. E. 480, 62 A.L.R. 402.

For discussion of statutes forbidding scurrilous and subversive publication concerning the United States as not violative of this constitutional guaranty, see SEDITION, SABOTAGE, ETC.

14 Re Stolen, 193 Wis. 602, 214 N. W. 379, 216 N. W. 127, 55 A.L.R. 1355.

15 McKee v. Hughes, 133 Tenn. 455, 181 S. W. 930, L.R.A.1916D, 391, Ann. Cas. 1918A, 459 (recognizing rule, but holding no malice existed).

16 See infra, notes 17–20, this section.

17 State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N. W. 473, 23 L.R.A.(N.S.) 839.

18 Ibid.

19 Yancey v. Com. 135 Ky. 207, 122 S. W. 123, 25 L.R.A.(N.S.) 455.

20 State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

1 Brotherhood of R. Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456, 47 A.L.R. 270; Davidson v. Jennings, 27 Colo. 187, 60 P. 354, 48 L.R.A. 340, 83 Am. St. Rep. 49; Day v. Day, 12 Idaho, 556, 86 P. 531, 10 Ann. Cas. 260; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422; Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407; Ahmed's Case, 278 Mass. 180, 179 N. E. 684, 79 A.L.R. 669; Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044; State ex rel. Davidson v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Re Chambers, 322 Mo. 1086, 18 S. W. (2d) 30, 67 A.L.R. 41; Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 688; Randolph v. Springfield, 332 Mo. 33, 257 S. W. 449, 31 A.L.R. 612; British-American Portland Cement Co. v. Citizens Gas Co. 255 Mo. 1, 164 S. W. 488, Ann. Cas. 1915C, 151; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207; Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144; Ex parte Ellis, 3 Okla. Crim. Rep. 220, 105 P. 184, 25 L.R.A. (N.S.) 653, Ann. Cas. 1912A, 863; Marquardt v. Fisher, 135 Or. 256, 295 P. 499, 77 A.L.R. 265; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756; McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L.R.A.1915E. 858, Ann. Cas. 1917A, 1046; Harrison v. Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; Townsend v. Townsend, Peck (Tenn.) 1, 14 Am. Dec. 722; Clem v. Evans (Tex.) 291 S. W. 871, 51 A.L.R. 1135; McCoy v. Kenosha County, 195 Wis. 273, 218 N. W. 348, 57 A.L.R. 412; Keenan's Will, 188 Wis. 163, 205 N. W. 1001, 42 A.L.R. 836.

Article 2, § 6, of the Oklahoma Constitution, provides: "Right and justice shall be administered without sale, denial, delay, or prejudice."

Maryland's Constitution (Declaration of Rights, Art. 19) provides that every man ought to have remedy "speedily without delay, according to law of the land." Idaho's Constitution, Art 1, § 18, is substantially the same as that of Oklahoma. In the constitutional provisions of practically all of the states denial and delay of justice are prohibited. Arkansas (1874) Art 2, § 13; Colorado (1876) Art. 2, § 6; Connecticut (1818) Art. 1, § 12; Delaware (1897) Art. 1, § 9; Florida (1885) Declaration of Rights, § 4; Illinois (1870) Art. 2, § 19; Indiana (1851) Art. 1, § 12; Kentucky

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40, which provides: "We will sell to no man, we will not deny to any man, either justice or right."[2] The chief purpose of the Magna Charta provision was to prohibit the King from selling justice by imposing fees on litigants through his courts[3] and to deal a death blow to the attendant venal and disgraceful practices of a corrupt judiciary in demanding oppressive gratuities for giving or withholding decisions in pending causes.[4] It has been appropriately said that in a free government the doors of litigation are already wide open and must constantly remain so.[5] The extent of the constitutional provision has been regarded as broader than the original confines of Magna Charta, and such constitutional provision has been held to prohibit the selling of justice not merely by magistrates but by the state itself.[6]

A constitutional provision that right and justice shall be administered according to such guaranties is mandatory upon the departments of government. Hence, it requires that a cause shall not be heard before a prejudicial court.[7] The word "prejudice," however, in the constitutional provision that justice shall be administered without prejudice, cannot be said to apply to contempts committed by a litigant after he has accepted the forum.[8] These guaranties cannot be destroyed, denied, abridged, or impaired by legislative enactments.[9]

In some instances, because of the nature of the power which would be involved in litigation or because of agreements between parties concerning extraordinary subject matter, such constitutional provisions do not prevent an abridgment of the right of individuals to seek court redress.[10] Thus, such provisions were not intended to change the law with respect to certain rights which are vested in the state—which alone can exercise sovereign powers—such as the exclusive right of the sovereign state to dissolve a corporation or wind up it affairs.[11] The general contract rights of members of a labor

(1890) § 14; Massachusetts (1780) Art. 1, § 11; Maryland (1867) Declaration of Rights, § 19; Maine (1819) Art. 1, § 19; Minnesota (1857) Art. 1, § 8; North Carolina (1876) Art. 1, § 35; North Dakota (1889) § 22; New Hampshire (1902) Art. 1, § 14; Oregon (1857) Art. 1, § 10; Pennsylvania (1873) Art. 1, § 11; Rhode Island (1842) Art. 1, § 5; South Carolina (1895) Art. 1, § 15; Tennessee (1870) Art. 1, § 17; Vermont (1793) Art. 1, § 4; West Virginia (1872) Art. 3, § 17; Wisconsin (1848) Art. 1, § 9; Alabama (1901) Art. 1, § 13; Mississippi (1890) § 24; Montana (1889) Art. 3, § 6; Wyoming (1889) Art. 1, § 8. State ex rel. Atty. Gen. v. Owens, 125 Okla. 66, 256 P. 704, 52 A.L.R. 1270.

[2] Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Knee v. Baltimore City Pass. R. Co. 87 Md. 623, 40 A. 890, 42 L.R.A. 363; State ex rel. Davidson v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701; Re Chambers, 322 Mo. 1086, 18 S. W. (2d) 30, 67 A.L.R. 41; State ex rel. Atty. Gen. v. Owens, 125 Okla. 66, 256 P. 704, 52 A.L.R. 1270; Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756; Harrison v. Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

Annotation: L.R.A.1918B, 150.

[3] Re Lee, 64 Okla. 310, 168 P. 53, L.R.A. 1918B, 144; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756.

Annotation: L.R.A.1918B, 150.

[4] Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207; Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144.

Annotation: L.R.A.1918B, 150.

[5] Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 P. 1125, 15 L.R.A. 369, 31 Am. St. Rep. 284.

[6] Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207.

[7] Day v. Day, 12 Idaho, 556, 86 P. 531, 10 Ann. Cas. 260; Ex parte Ellis, 3 Okla. Crim. Rep. 220, 105 P. 184, 25 L.R.A.(N.S.) 653, Ann. Cas. 1912A, 863.

[8] State ex rel. Atty. Gen. v. Owens, 125 Okla. 66, 256 P. 704, 52 A.L.R. 1270.

[9] Ex parte Ellis, 3 Okla. Crim. Rep. 220, 105 P. 184, 25 L.R.A.(N.S.) 653, Ann. Cas. 1912A, 863; Townsend v. Townsend, Peck (Tenn.) 1, 14 Am. Dec. 722; Union Sav. & Invest. Co. v. District Ct. 44 Utah, 397, 140 P. 221, Ann. Cas. 1917A, 821.

[10] See infra, notes 11–13, this section.

[11] Union Sav. & Invest. Co. v. District Ct. 44 Utah, 397, 140 P. 221, Ann. Cas. 1917A, 821.

A constitutional provision that every person ought to find a certain remedy by having recourse to the laws, for all injuries which he may receive in his person, property, or character, and ought to obtain right and justice freely and without pur-

union with respect to the accumulation, protection, and distribution of its property to the legitimate ends to be obtained within the laws of the union, not contrary to the law of the state, are not affected by such constitutional provisions.[12] Moreover, rules of a labor union making the decision of its authorities as to the right to strike benefits conclusive are not invalid under such provisions.[13]

A constitutional provision guaranteeing to residents of the state the right to resort to the courts on equal terms with others does not preclude the courts from making a reasonable classification of litigants in determining whether to retain jurisdiction of actions instituted by them.[14]

Legislation and orders concerning costs and fees have often been assailed under constitutional provisions insuring justice without sale. It is a general rule that reasonable costs may be imposed on litigants without violating these constitutional guaranties;[15] the constitutional right to obtain justice freely and without purchase is not the right to have judicial proceedings carried on without expense to the parties, in the form of reasonable, legally prescribed fees or costs,[16] for it was never meant that a litigant should have the right to conduct his suit in court without cost.[17] Thus, the imposition of costs on litigation, to be paid by the unsuccessful party, does not violate the guaranties of justice.[18] The exaction of payment of a docket fee from one appealing to the supreme court of the state, before rendition of the services to be paid for thereby, does not render the statute imposing it unconstitutional;[19] and a statute authorizing officers to tax and collect reasonable fees for services, to create a fund out of which their salaries are to be paid, does not violate such provisions.[20] Requiring an insurance company to pay a penalty and attorneys' fees if compelled to pay a loss which it fails to pay within the time specified in a contract does not tend to prevent a resort to the courts, in contravention of a constitutional requirement that all courts shall be open.[1] A statute, however, which, in making an allowance of an attorney's fee in addition to costs that would otherwise be allowed by law to successful lien claimants, provides

chase, has no application to a statutory provision for the appraisal and acquisition by the corporation of the shares of stockholders not consenting to a sale or lease of the corporation's assets and franchises. Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756.

[12] Brotherhood of R. Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456, 47 A.L.R. 270.

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[13] Brotherhood of R. Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456, 47 A.L.R. 270.

[14] Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N. E. 152, 87 A.L.R. 1407.

[15] Conneau v. Geis, 73 Cal. 176, 14 P. 580, 2 Am. St. Rep. 785; Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450; Eckrich v. St. Louis Transit Co. 176 Mo. 621, 75 S. W. 755, 62 L.R.A. 911, 98 Am. St. Rep. 517; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A. (N.S.) 997, Ann. Cas. 1916C, 207; Re Lee, 64 Okla. 310, 168 P. 53, L.R.A.1918B, 144; Marquardt v. Fisher, 135 Or. 256, 295 P. 499, 77 A.L.R. 265; Northern Counties Trust v. Sears, 30 Or. 388, 41 P. 931, 35 L.R.A. 188.

Annotation: L.R.A.1918B, 150, 151.

As to the constitutionality of legislation concerning costs generally, see COSTS.

[16] Knee v. Baltimore City Pass. R. Co. 87 Md. 623, 40 A. 890, 42 L.R.A. 363; State ex rel. Davidson v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701.

[17] Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. Rep. 450.

[18] Harrison v. Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

[19] Re Lee, 64 Okla. 310, 168 P. 53, L.R.A. 1918B, 144.

An order staying all further proceedings in an action until the costs of an appeal are paid does not violate constitutional guaranties of the right to trial by jury and to have justice freely, without sale. Knee v. Baltimore City Pass. R. Co. 87 Md. 623, 40 A. 890, 42 L.R.A. 363.

[20] State ex rel. Starke County v. Laramore, 175 Ind. 478, 94 N. E. 761, Ann. Cas. 1913B, 1296; Henderson v. State, 137 Ind. 552, 36 N. E. 257, 24 L.R.A. 469; Northern Counties Trust v. Sears, 30 Or. 388, 41 P. 931, 35 L.R.A. 188.

[1] Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 982, 24 L.R.A. 504.

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for such allowance only to plaintiffs violates such guaranties in the Constitution.[2] In any situation if the legislation or order passes the bounds of reasonableness, it violates the constitutional provisions.[3] Under such provisions suitors in a probate court of exclusive jurisdiction may not be required to pay, as a condition of their suits being entertained, a graduated cost fee amounting to a tax as measured by the value of their property, without regard to the nature or extent of the judicial proceedings which may be invoked or may become necessary.[4]

The constitutional guaranty "to obtain justice and right freely" is not impaired by requiring a successful candidate for office to go to another county to answer an election contest.[5]

The cognate constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property (and usually also for injury done to his reputation) is found in the Constitutions of many of the states.[6] It means that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy,[7] or that laws shall be enacted giving a certain remedy for all injuries or wrongs.[8] "Remedy by

2 Davidson v. Jennings, 27 Colo. 187, 60 P. 354, 48 L.R.A. 340, 83 Am. St. Rep. 49.

3 State ex rel. Davidson v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701.

4 State ex rel. Davidson v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207.

Annotation: 108 A.L.R. 521.

5 Ashley v. Three Justices (Ashley v. Wait) 228 Mass. 63, 116 N. E. 961, 8 A.L.R. 1463, writ of error dismissed in 250 U. S. 652, 63 L. ed. 1190, 40 S. Ct. 53.

6 Brotherhood of R. Trainmen v. Barnhill, 214 Ala. 565, 108 So. 456, 47 A.L.R. 270; Sparks v. McCreary, 156 Ala. 382, 47 So. 332, 22 L.R.A.(N.S.) 1224; Comer v. Age-Herald Pub. Co. 151 Ala. 613, 44 So. 673, 13 L.R.A.(N.S.) 525; State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85; Dougherty v. American McKenna Process Co. 255 Ill. 369, 99 N. E. 619, L.R.A.1915F, 955, Ann. Cas. 1913D, 568; Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044; Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311; Re Chambers, 322 Mo. 1086, 18 S. W. (2d) 30, 67 A.L.R. 41; Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 688; Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 31 A.L.R. 612; British-American Portland Cement Co. v. Citizens Gas Co. 255 Mo. 1, 164 S. W. 468, Ann. Cas. 1915C, 151; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L.R.A. 648; Malin v. Lamoure County, 27 N. D. 140, 145 N. W. 582, 50 L.R.A.(N.S.) 997, Ann. Cas. 1916C, 207; Kintz v. Harriger, 99 Ohio St. 240, 124 N. E. 168, 12 A.L.R. 1240; Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913; Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L.R.A. 769; Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236; Mattson v. Astoria, 39 Or. 577, 65 P. 1066, 87 Am. St. Rep. 687; Narragansett Electric Lighting Co. v. Sabre, 50 R. I. 288, 146 A. 777, 147 A. 668, 66 A.L.R. 1553, later appeal in 51 R. I. 37, 150 A. 756; Harrison v. Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; Townsend v. Townsend, Peck (Tenn.) 1, 14 Am. Dec. 722; Hanks v. Port Arthur, 121 Tex. 202, 48 S. W. (2d) 944, 83 A.L.R. 278; Clem v. Evans (Tex.) 291 S. W. 871, 51 A.L.R. 1135; Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 173 P. 556, 3 A.L.R. 715; State v. Cadigan, 72 Vt. 245, 50 A. 1079, 57 L.R.A. 666, 87 Am. St. Rep. 714; McCoy v. Kenosha County, 195 Wis. 273, 218 N. W. 348, 57 A.L.R. 412; Keenan's Will, 188 Wis. 163, 205 N. W. 1001, 42 A.L.R. 836.

In Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 59 P. (2d) 1132, 111 A.L.R. 998 ("automobile guest statute"), the court pointed out that although in Washington there is no constitutional provision granting a remedy for injury to person, property, or reputation, in those states where there is such a provision, it is, in effect, a limitation upon the power of the legislature to abolish rights of action for such injury.

As to the validity under such a constitutional provision of "guest statutes" limiting or abolishing the right of automobile guests against their hosts, see AUTOMOBILES, Vol. 5, p. 633, § 238, and supplement.

As to the effect of a constitutional provision insuring a remedy for all wrongs upon a clause in a will forfeiting a legacy for violation of a condition against contest, see WILLS [Also 28 R. C. L. p. 315, § 301].

7 State v. Rose, 33 Del. 168, 132 A. 864, 45 A.L.R. 85; Francis v. Western U. Teleg. Co. 58 Minn. 252, 59 N. W. 1078, 25 L.R.A. 406, 49 Am. St. Rep. 507; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A.L.R. 626; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L.R.A. 648; Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236; Mattson v. Astoria, 39 Or. 577, 65 P. 1066, 87 Am. St. Rep. 687; Clem v. Evans (Tex.) 291 S. W. 871, 51 A.L.R. 1135.

8 Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236; Mattson v.

due course of law," so used, means the reparation for injury ordered by a tribunal having jurisdiction, in due course of procedure, after a fair hearing.[9] This provision relates primarily to the assertion of affirmative rights.[10] It has been held to apply only to injuries sustained in the state; hence, it does not invalidate legislation which forbids prosecution of death actions for a death occurring outside the state.[11]

This provision of the Constitution does not create any new right, but is merely a declaration of a general fundamental principle.[12] The protection from legislative abolishment of those jural rights which had become well established prior to the enactment of the Constitution is its purpose.[13] The phrase "conformably to the laws," in such a constitutional provision, relates to a recognized, long-established system of laws existing in states adopting Constitutions, as well as in the prior organizations from which the states were formed.[14] It has consequently been held not to be violated by the repeal of a statute which created a right of action, such right of action not existing at common law.[15]

It is a primary duty of the courts to safeguard the declaration of right and remedy guaranteed by a constitutional provision insuring a remedy for all injuries,[16] but such a provision is not violated solely because the granting of a remedy rests in the sound discretion of a court.[17] The provision, however, applies only to judicial questions. It is not meant thereby that a court may reach out and usurp powers which belong to the legislature.[18]

The constitutional provision guaranteeing a remedy to every person for every injury has been applied in a variety of instances to prevent the legislature from denying access to the courts to certain persons.[19] Under it a foreign corporation cannot be denied access to the courts for failure to register.[20] It also invalidates a law which purports to suspend the privilege of prosecuting and defending actions and judicial proceedings as to any prospective litigant who had aided in the Civil War against the United States.[1]

A stay or suspension law closing the courts for such a period as two years violates the guaranty of a remedy for all injuries.[2]

The position has been taken that the form and extent of the remedy which every person shall have for injuries are necessarily subject to the legislative

Astoria, 39 Or. 577, 65 P. 1066, 87 Am. St. Rep. 687.

9 Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041, 64 L.R.A. 790, 104 Am. St. Rep. 422.

10 Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044.

11 Dougherty v. American McKenna Process Co. 255 Ill. 369, 99 N. E. 619, L.R.A. 1915F, 955, Ann. Cas. 1913D, 568.

12 Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044; Beaulieu v. Great Northern R. Co. 103 Minn. 47, 114 N. W. 353, 19 L.R.A.(N.S.) 564, 14 Ann. Cas. 462; Francis v. Western U. Teleg. Co. 58 Minn. 252, 59 N. W. 1078, 25 L.R.A. 406, 49 Am. St. Rep. 507.

13 Stewart v. Houk, 127 Or. 589, 271 P. 998, 272 P. 893, 61 A.L.R. 1236.

14 McCoy v. Kenosha County, 195 Wis. 273, 218 N. W. 348, 57 A.L.R. 412.

15 Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730.

16 Kintz v. Harriger, 99 Ohio St. 240, 124 N. E. 168, 12 A.L.R. 1240.

17 Peters v. Duluth, 119 Minn. 96, 137 N. W. 390, 41 L.R.A.(N.S.) 1044.

18 Salt Lake City v. Utah Light & Traction Co. 52 Utah, 210, 173 P. 556, 3 A.L.R. 715 (rate-fixing).

19 Randolph v. Springfield, 302 Mo. 33, 257 S. W. 449, 31 A.L.R. 612.

A statute depriving one injured by negligence of a city so severely that he is unable to give notice of the injury within the time prescribed by the statute, of a right of action for the injury, violates a constitutional provision that a certain remedy shall be afforded for every injury where the right to maintain such action is given by the common law. Ibid.

20 British-American Portland Cement Co. v. Citizens Gas Co. 255 Mo. 1, 164 S. W. 468, Ann. Cas. 1915C, 151.

See CORPORATIONS [Also FOREIGN CORPORATIONS, 12 R. C. L. p. 93, §§ 70 et seq.].

1 Davis v. Pierse, 7 Minn. 13, Gil. 1, 82 Am. Dec. 65.

2 Coffman v. Bank of Kentucky, 40 Miss. 29, 90 Am. Dec. 311.

As to the effect of moratory war legislation not to violate the guaranty, see WAR.

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power.[3] Elsewhere it has been held, however, that the guaranty of a remedy for the protection of property and reputation shall be regarded by the legislature in passing laws relating to evidence and remedies as well as in legislating with reference to substantive law.[4] If a litigant in a civil case is forbidden by statute to obtain evidence otherwise available, the power of the court to enforce his rights is impaired and a "certain remedy" is not "afforded."[5] The same unconstitutional result is obtained if an act of the legislature seeks to require a litigant not only to assume a burden of proof but also to establish the reason for prevention of the performance of a promise, because it has the effect to close the doors of the courts in his face and to refuse him the right to deny the charge against him.[6]

In a jurisdiction where the Constitution does not specifically guarantee a remedy for all injuries, but provides that no person shall be deprived of property without due process of law and that the common law as it existed before the adoption of the first state Constitution shall continue and be the law of the state, subject to such alterations as the legislature shall make, a statute has been held to be constitutional in so far as it abolishes a cause of action for breach of promise to marry[7] or a cause of action for alienation of affections and criminal conversation.[8]

§ 327. Freedom from Imprisonment for Debt.—Most of the state Constitutions contain provisions which, although varying considerably in terminology and application, generally prohibit imprisonment for debt.[9]

In some states the provision broadly states "that no person shall be imprisoned for debt." Such inhibition is absolute and contains within its terms no exceptions.[10] In some of such jurisdictions imprisonment for debt, even in case of fraud, is held to be a violation of the state Constitution.[11] Elsewhere, it has been held that the legislature has power to authorize punishment including imprisonment in some cases under a similar constitutional provision, not as a punishment for debt, but for such an intentional fraud that through it the offender obtains the property of another without compensation.[12]

[3] Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

[4] Byers v. Meridian Printing Co. 84 Ohio St. 408, 95 N. E. 917, 38 L.R.A.(N.S.) 913; Clem v. Evans (Tex.) 291 S. W. 871, 51 A.L.R. 1135.

[5] Re French, 315 Mo. 75, 285 S. W. 513, 47 A.L.R. 688.

[6] Clem v. Evans (Tex.) 291 S. W. 871, 51 A.L.R. 1135.

[7] Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229.
Annotation: 109 A.L.R. 1234.

[8] Annotation: 109 A.L.R. 1234.
In Fearon v. Treanor, 272 N. Y. 268, 273 N. Y. 528, 5 N. E. (2d) 815, 7 N. E. (2d) 677, 109 A.L.R. 1229, the court indicated by dictum that a cause of action for seduction could be abolished by the legislature because that cause of action did not exist at common law. However, in another and later case (set out in full in annotation: 109 A.L.R. 1234) the same court expressly refrained from expressing any opinion as to the validity of the statute in so far as it abolishes an action for seduction.

[9] Annotation: 34 L.R.A. 634 et seq.
In the annotation: 34 L.R.A. 642 et seq., there is set out an exhaustive list of the state constitutional provisions which prohibit imprisonment for debt.
See Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 S. Ct. 269 (order of bankruptcy court directing imprisonment of bankrupt until he pays funds over to trustee held not to constitute imprisonment for debt).

[10] State v. Vann, 150 Ala. 66, 43 So. 357, 14 Ann. Cas. 1058; Carr v. State, 106 Ala. 35, 17 So. 350, 34 L.R.A. 634, 54 Am. St. Rep. 17; Caughron v. Stinespring, 132 Tenn. 636, 179 S. W. 152, L.R.A.1916C, 403; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656; State v. Paint Rock Coal & Coke Co. 92 Tenn. 81, 20 S. W. 499, 36 Am. St. Rep. 68.

[11] Carr v. State, 106 Ala. 35, 17 So. 350, 34 L.R.A. 634, 54 Am. St. Rep. 17.
A constitutional provision "that no persons shall be imprisoned for debt" is violated by a statute making it a misdemeanor for a person engaged in banking to receive a deposit when insolvent and punishing with a fine not less than double the amount of the deposit, one half of which shall go to the depositor, and providing that payment to him before conviction shall be a defense to prosecution. Ibid.

[12] State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656. See People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.
A statute providing that any person who fraudulently obtains accommodations at an inn, hotel, or boardinghouse or fraudulently removes his baggage or other property shall be guilty of a misdemeanor and be punished accordingly does not violate the constitutional provision prohibiting the passage of any law authorizing imprisonment for debt. State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656.

In a few other states the Constitution forbids imprisonment for debt except in cases of absconding debtors.[13] Such a prohibition is broad and sweeping, and no limitations should be read into it except that exception which actually exists, inserted by the makers of the Constitution themselves in accordance with their expressed intention.[14] A statute authorizing the imprisonment of one who obtains food and lodging without paying therefor, with intent to defraud, or who, after obtaining it, absconds without paying for it does not contravene such a constitutional provision, because it punishes a deliberate fraud.[15]

In many of the state Constitutions the inhibition against imprisonment for debt exists only where the obligation out of which the claim arises is free from fraud, since the Constitutions of many of the states except cases of fraud and make that a ground of imprisonment.[16] Such a constitutional provision is not violated by an act making it punishable for any person to procure money or other thing of value on a contract to perform services, with intent to defraud.[17] Wilful and unjust refusal to comply, however, with the terms of a contract to perform services is not legal fraud within the meaning of an exception to a constitutional provision forbidding imprisonment for debt except in case of fraud.[18] Statutes have been enacted providing for the imprisonment of any person who, with the intent to injure or defraud his employer, obtains money or other personal property under a written contract for the performance of work and without making restitution and without just cause refuses or fails to perform such work.[19] The courts have usually, however, refused to recognize any element of fraud in such situations and have held statutes of this type unconstitutional as violating provisions prohibiting imprisonment for debt except in cases of fraud.[20] A finding for the plaintiff in an action to recover money alleged to be due under a partnership transaction

[13] Austin v. Seattle, 176 Wash. 654, 30 P. (2d) 646, 93 A.L.R. 203; Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833.
Annotation: 34 L.R.A. 650; 20 Ann. Cas. 1345.

[14] Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833.

[15] Re Milecke, 52 Wash. 312, 100 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968.

[16] State v. Ensley, 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; State v. Avery, 111 Kan. 588, 207 P. 838, 23 A.L.R. 453; Burnett v. Trimmell, 103 Kan. 130, 173 P. 6, L.R.A.1918E, 1058; Ex parte Clark, 20 N. J. L. 648, 45 Am. Dec. 394; Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, 10 L.R.A.(N.S.) 362; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; Voelkel v. Cincinnati, 112 Ohio St. 374, 147 N. E. 754, 40 A.L.R. 73; Luhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675; State v. Nelson, 58 S. D. 562, 237 N. W. 766, 76 A.L.R. 1226.
Annotation: 34 L.R.A. 636, 642 et seq.; 37 Am. St. Rep. 758; 20 Ann. Cas. 1345.
Although there is no express provision in the Constitution of New York prohibiting imprisonment for debt, there are statutory provisions in that state which prohibit such imprisonment except in cases of fraud and fraudulent dealings on the part of a debtor. Annotation: 34 L.R.A. 647.
As to the punishment of issuers of bad checks as not constituting a violation of the guaranty forbidding imprisonment for debt, see FALSE PRETENSES [Also 11 R. C. L. p. 852, § 35 and 1937 supplement].

[17] Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007.

[18] Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

[19] Ibid.

[20] Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105, overruling State v. Chapman, 56 S. C. 420, 34 S. E. 961, 76 Am. St. Rep. 557.
Annotation: 14 Ann. Cas. 1060.
Contra.—State v. Vann, 150 Ala. 66, 43 So. 357, 14 Ann. Cas. 1058. This result was reached in the Vann Case, supra, in spite of the fact that the provision of the Alabama Constitution therein construed was even broader than the provision of the South Carolina Constitution construed in ex parte Hollman, 79 S. C. 9, 60 S. E. 19; the effect of the Vann case is reversed by Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 S. Ct. 145, in which case the United States Supreme Court held that such a state statute violates the Thirteenth Amendment to the Federal Constitution.

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does not necessarily establish fraud, so as to authorize the defendant's imprisonment for the debt, although fraud was alleged in the complaint, where there was evidence of matters showing simply an obligation, arising out of them, to pay over the money.[1]

In still other states the Constitution prohibits imprisonment for debt unless there is a strong presumption of fraud, or unless there has been a refusal to deliver up a debtor's estate for the benefit of his creditors in the manner prescribed by law.[2] In still others the Constitution states that imprisonment for debt shall not be allowed, except for the nonpayment of fines and penalties imposed for the violation of law.[3]

The purpose of any such provisions in a state Constitution is to prevent the useless and often cruel imprisonment of persons who, having honestly become indebted to another, are unable to pay as they undertook and promised.[4] The spirit of such provisions is to protect an honest debtor who is poor and has nothing with which to pay, so that he should not be at the mercy of his creditors if his insolvency is bona fide.[5] As in the case of all constitutional provisions designed to safeguard the liberties of the person,[6] every doubt should be resolved in favor of the liberty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt.[7] Such constitutional guaranties cannot be circumvented by indirection. Thus, the legislature has no power to declare the mere nonperformance of a contract of indebtedness a misdemeanor and to punish the commission thereof by imprisonment directly or indirectly;[8] such a provision cannot be evaded by the device of declaring, in a municipal ordinance or statute, a simple breach of contract to be a crime.[9] A statute providing a fine for the failure to pay wages in cash violates the constitutional provision against imprisonment for debt, if failure to pay the fine will result in imprisonment.[10]

It has been said that the words "imprisonment for debt" have a well-defined and well-known meaning and were used by the framers of the Constitution in their well-understood sense;[11] they are to have a common-sense interpretation.[12] It is also a rule that such provisions are to be interpreted not only in the light of the common law, but also by comparison with previously existing Constitutions.[13]

In the consideration of the question of the constitutionality of an imprisonment for debt, the question arises as to what are debts within the meaning of the constitutional provision. There seems to be very little conflict among the authorities which almost unanimously hold that the debt intended to be covered by the Constitution must be a debt arising exclusively from actions

[1] Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, 10 L.R.A.(N.S.) 362.

[2] People v. La Mothe, 331 Ill. 351, 163 N. E. 6, 60 A.L.R. 316.
Annotation: 34 L.R.A. 649.

[3] State v. Taylor, 335 Mo. 460, 73 S. W. (2d) 378, 95 A.L.R. 476; Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L.R.A. 1917B, 551.
Annotation: 19 Ann. Cas. 759.

[4] Annotation: 34 L.R.A. 636.

[5] Ex parte Clark, 20 N. J. L. 648, 45 Am. Dec. 394.

[6] See supra, § 59.

[7] People v. La Mothe, 331 Ill. 351, 163 N. E. 6, 60 A.L.R. 316.

[8] Carr v. State, 106 Ala. 35, 17 So. 350, 34 L.R.A. 634, 54 Am. St. Rep. 17.

[9] Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L.R.A.1917B, 551.
A municipal corporation cannot, under a constitutional provision forbidding imprisonment for debt, provide for imprisonment of one who refuses to pay for use of a vehicle which he has hired to transport himself or his property. Ibid.

[10] State v. Prudential Coal Co. 130 Tenn. 275, 170 S. W. 56, L.R.A.1915B, 645.

[11] Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, Ann. Cas. 1917D, 833 ("debt" is used in its popular and general sense).
Annotation: 34 L.R.A. 636.

[12] Annotation: 34 L.R.A. 634.

[13] Annotation: 34 L.R.A. 634.

ex contractu[14] and that it was never meant to include damages arising in actions ex delicto[15] or even penalties and other impositions imposed by the courts in criminal proceedings as punishments for crimes committed against the law.[16] It has been stated that the word "debt" is of large import, including not only debts of record, judgments, and debts of specialty, but also obligations under simple contract to a very wide extent;[17] in its popular sense it includes all that is due to a man under any form of obligation or promise.[18] Many different types of obligations arising out of express or implied agreements and contracts have been held to be debts within such constitutional inhibition.[19] The service due by a laborer under a contract to perform farm labor is a debt within the meaning of the constitutional provision prohibiting imprisonment for debts, since a debt is that which is due from one person to another whether money, goods, or services and whether payable at present or at a future time.[20]

The constitutional inhibition as to imprisonment for debt does not apply to cases founded upon torts committed by the defendant, even though it may be contended that the judgment for damages recovered in such action constitutes a debt owing by the defendant to the plaintiff.[1] Hence, in actions where the ground or form of action is ex delicto, the courts generally hold that a defendant is liable to be imprisoned not necessarily for the debt which he owes, but for the wrong which he has done.[2] Under this rule, defendants in tort actions have been imprisoned without violation of the Constitution in actions involving many varieties of tort,[3] such as libel,[4] ejectment,[5] trespass,[6] replevin,[7] and trover and conversion.[8] It has been held, however, in at least one jurisdiction, that the constitutional prohibition of imprisonment for debt applies to imprisonment upon a judgment for damages for a tort, such as seduction.[9]

Imprisonment for the failure to meet certain obligations arising from the marital relationship does not fall within the constitutional inhibition.[10] The failure to meet one's obligation to support his wife is not a debt within the meaning of a constitutional provision forbidding imprisonment for debt;[11]

[14] Re Milecke, 52 Wash. 312, 100 P. 743, 21 L.R.A.(N.S.) 259, 132 Am. St. Rep. 968.
Annotation: 34 L.R.A. 636; 37 Am. St. Rep. 758.

[15] Annotation: 34 L.R.A. 636, 640 et seq.; 37 Am. St. Rep. 760; 20 Ann. Cas. 1344.

[16] Annotation: 34 L.R.A. 636, 651 et seq.; 37 Am. St. Rep. 761.

[17] Second Nat. Bank v. Becker, 62 Ohio St. 289, 56 N. E. 1025, 51 L.R.A. 860.
Annotation: 34 L.R.A. 636.

[18] Annotation: 34 L.R.A. 636.

[19] Second Nat. Bank v. Becker, 62 Ohio St. 289, 56 N. E. 1025, 51 L.R.A. 860.
Annotation: 34 L.R.A. 637 et seq.

[20] Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105.

[1] Harris v. Bridges, 57 Ga. 407, 24 Am. Rep. 495; Stidham v. Du Bose, 128 S. C. 318, 121 S. E. 791, 33 A.L.R. 645; Ex parte Berry, 85 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L.R.A.(N.S.) 242, 14 Ann. Cas. 1105; Hormann v. Sherin, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744; Re Milecke, 52 Wash. 312, 100 P. 743, 21 L.R.A. (N.S.) 259, 132 Am. St. Rep. 968; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.
Annotation: 34 L.R.A. 640 et seq.; 37 Am. St. Rep. 760; 20 Ann. Cas. 1344.

[2] Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470.
Annotation: 34 L.R.A. 640.

[3] Annotation: 34 L.R.A. 640 et seq.; 20 Ann. Cas. 1345 et seq.

[4] Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470.
Annotation: 20 Ann. Cas. 1346.

[5] Annotation: 34 L.R.A. 641; 20 Ann. Cas. 1346.

[6] Annotation: 34 L.R.A. 641.

[7] Annotation: 20 Ann. Cas. 1346.

[8] Harris v. Bridges, 57 Ga. 407, 24 Am. Rep. 495.
Annotation: 37 Am. St. Rep. 760; 20 Ann. Cas. 1346.

[9] Bronson v. Syverson, 88 Wash. 264, 152 P. 1039, L.R.A.1916B, 993, holding that "debt" as used in the Washington Constitution includes judgments entered in actions ex delicto as well as in actions ex contractu.

[10] See cases cited infra, notes, 11, 12, this section.

[11] State v. English, 101 S. C. 304, 85 S. E. 721, L.R.A.1915F, 977.
Annotation: 48 A.L.R. 1195,

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and the claim of a wife against her husband for the support of herself and children is not a debt within the meaning of the provision.[12]

Fines or penalties arising from a violation of the penal laws of the state, city, or village ordinances are not debts within the meaning of a constitutional provision prohibiting imprisonment for debt.[13] Imprisonment for the failure to pay a fine is not an unconstitutional imprisonment for debt.[14]

Provisions abolishing imprisonment for debt have no application to taxes[15] or to license regulations enforced by fine and/or imprisonment.[16] It is generally held, however, that a person cannot be imprisoned through the failure to pay an inspection fee by making such failure to pay an offense.[17]

The provision in the Federal Constitution forbidding state impairment of the obligation of contracts has no application to state abolition of imprisonment for debt. The states have a right to abolish such imprisonment even though it may have constituted a part of the remedy for enforcing the performance of contracts. Imprisonment itself, however, is in no sense a part of the contract, and the simple release of a prisoner does not impair a contract obligation.[18]

In providing for the government of territories, Congress has upon occasion secured the guaranty against imprisonment for debt by incorporating it into the statutes which provide for the fundamental law of a territory.[19] When the guaranty is thus contained in a congressional statute rather than in a state constitutional provision, it nevertheless carries with it the well-known meaning which it has acquired by interpretation and must so be interpreted and enforced in the statutory guaranty.[20] Hence, such a statute is not intended to take away the right to enforce criminal statutes and punish wrongful embezzlement. Such guaranties are rather intended to prevent the commitment of debtors to prison for liabilities arising under contracts.[1]

The constitutional inhibition against imprisonment for debt has often been sought to be applied to proceedings which are the method of enforcement of a decree of an equity court. It is generally held that a punishment of contempt of court by such an equity court for the violation of a decree does not constitute imprisonment for debt within the meaning of the constitutional inhibition.[2] In various matters of process connected with civil-law actions the guaranty has been invoked. In many cases in which civil arrest upon mesne process has been resorted to, it has been resisted by virtue of this constitutional guaranty. The effect of the guaranty upon statutes authorizing arrest is considered elsewhere in detail.[3] Similar treatment elsewhere is made of similar questions which arise in cases in which it is sought to execute against the body of a judgment debtor after a judgment has been secured.[4]

[12] Fussell v. State, 102 Neb. 117, 166 N. W. 197, L.R.A.1918F, 421; Ex parte Davis, 101 Tex. 607, 111 S. W. 394, 17 L.R.A.(N.S.) 1140.

[13] Norris v. State, 95 Ind. 73, 48 Am. Rep. 700; Kansas City v. Pengilley, 269 Mo. 59, 189 S. W. 380, L.R.A. 1917B, 551; Peterson v. State, 79 Neb. 132, 112 N. W. 306, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651. See Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 S. Ct. 592, 19 Ann. Cas. 755.

Annotation: 34 L.R.A. 651 et seq.; 37 Am. St. Rep. 761; 19 Ann. Cas. 757.

The provision does not apply to a statute making it an offense for a public officer in possession of public funds to fail to deliver such funds to the proper officials at the time specified by law. Annotation: 40 A.L.R. 82.

[14] Re Murphy, 119 Or. 658, 250 P. 834, 49 A.L.R. 384.

[15] See TAXATION [Also 26 R. C. L. p. 384, § 340].

[16] Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L.R.A. 922; Voelkel v. Cincinnati, 112 Ohio St. 374, 147 N. E. 754, 40 A.L.R. 73; State v. Anderson, 144 Tenn. 564, 234 S. W. 768, 19 A.L.R. 180; Salt Lake City v. Christensen, 34 Utah. 38, 95 P. 523, 17 L.R.A.(N.S.) 898; Austin v. Seattle, 176 Wash. 654, 30 P. (2d) 646, 93 A.L.R. 203.

Annotation: 40 A.L.R. 77.

[17] Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; State v. McFarland, 60 Wash. 98, 110 P. 792, 140 Am. St. Rep. 909.

Annotation: 40 A.L.R. 81.

[18] Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Beers v. Houghton, 9 Pet. (U. S.) 329, 9 L. ed. 145; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

Annotation: 4 L. ed. 529.

[19] Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 S. Ct. 592, 19 Ann. Cas. 755 (Penal Code for Philippine Islands).

[20] Freeman v. United States, 217 U. S. 539, 54 L. ed. 874, 30 S. Ct. 592, 19 Ann. Cas. 755.

[1] Ibid.

C. Liberty, Pursuit of Happiness, and Property as Guaranteed by Constitution

1. In General

§ 328. Fundamental Principles.—The theory upon which the political institutions and social structure of America rest is that all men have certain rights of life, liberty, and the pursuit of happiness, which are inalienable,[5] fundamental,[6] and inherent.[7] It has been said that these rights are before and higher than any constitutional sanction,[8] although it has been pointed out that in a practical aspect the only rights an individual has—or, for that matter, ever had— are the rights secured to him by law, and that therefore the rights to life, liberty, and property which the people had in mind when they adopted the Constitution were those secured to them by existing laws.[9] In the protection of these basic rights all persons are equal before the law.[10]

The preservation of fundamental rights by principle is primarily an Anglo-American concept. One of the greatest contributions of the English-speaking people to civilization is the protection by law of the private individual in the enjoyment of his property and his personal liberties against the demands and aggressions of the public.[11] In the protected position they now enjoy, it has been stoutly maintained that such rights are in their status of impregnability purely a New World contribution, on the theory that in the separation from Old World systems and the erection of a new one in this country, the former system, contemplating merely graces or privileges to the individual, was succeeded by the latter, contemplating a system of real rights in place of one of mere privileges enjoyable only through grace.[12] The test of history discloses, however, that the fundamental principle, now found in some form to be embodied in every one of the American Constitutions, guaranteeing that every person shall be protected in the enjoyment of his life, liberty, and property,

[2] See CONTEMPT, Vol. 12, § 64.

[3] See ARREST, Vol. 4, p. 37, §§ 54 et seq.

[4] See EXECUTIONS [Also 10 R. C. L. p. 1383, §§ 175 et seq.].

[5] Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Byers v. Sun Sav. Bank, 41 Okla. 728, 139 P. 948, 52 L.R.A.(N.S.) 320, Ann. Cas. 1916D, 222; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

The surrender of a fundamental right is not within the power of an individual if the public interest is thereby prejudiced. Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

[6] Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

[7] Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796.

[8] Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

[9] Carter v. Craig, 77 N. H. 200, 90 A. 598, 52 L.R.A.(N.S.) 211.

[10] Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

[11] Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.

[12] Ekern v. McGovern, 154 Wis. 157, 142 N. W. 595, 46 L.R.A.(N.S.) 796.

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except as they might be declared to be forfeited by the judgment of his peers or the law of the land, may be traced back to Magna Charta.[13]

It is often specifically provided in the Bill of Rights contained in a state Constitution that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property.[14] The Constitution was intended, and its very purpose was, to prevent experimentation with the fundamental rights of the individual.[15] A constitutional guaranty of the enjoyment of life, liberty, and property carries with it all that effectuates and renders complete the unrestrained enjoyment of that guaranty.[16] Government would not be free if the rights of personal liberty and private property should not be held sacred.[17]

It has been said that the rights to life, liberty, property, and the equal protection of the law are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three.[18] The Fourteenth Amendment recognizes liberty and property as coexistent and debars the states from any unwarranted interference with either.[19] Moreover, the words "life, liberty, and property" as used in Constitutions are representative terms and are intended to cover every right to which a member of the body politic is entitled under the law.[20] These terms

13 Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Levee Comrs. v. Johnson, 178 Ky. 287, 199 S. W. 8, L.R.A. 1918E, 202; Re Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; State v. Peel Splint Coal Co. 36 W. Va. 802, 15 S. E. 1000, 17 L.R.A. 385.

As to due process generally, see Vol. 12, Subd. XIV.

14 Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 S. Ct. 493 (Alabama Constitution); Ex parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; Blackman Health Resort v. Atlanta, 151 Ga. 507, 107 S. E. 525, 17 A.L.R. 516 (quoting from the Georgia Constitution).

15 Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375. See also New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371.

In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371, Justice Brandeis expressed a different view with reference to legislative experimentation. He said: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the Federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel, social, and economic experiments without risk to the rest of the country."

16 Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443.

17 Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1548.

18 Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420.

19 Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 S. Ct. 240; New Orleans v. Miller, 142 La. 163, 76 So 596, L.R.A.1918B, 331.

20 Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; Re Flukes, 157 Mo. 125, 57 S. W. 545, 51 L.R.A. 176, 80 Am. St. Rep. 619; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L.R.A. 293, 6 Am. St. Rep. 389.

The enjoyment of life, liberty, and property, and the right to pursue happiness, embrace all the comforts and pleasures which man's physical, intellectual, and moral nature is capable of acquiring, by the application and exercise of the various faculties with which he is endowed, and all that the world can afford him. Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540 (permitting a guardian to grant leases for mining coal from his ward's land, to extend beyond the minority of his ward, violates the constitutional right of the latter to pursue happiness).

The enjoyment of private reputation unassailed is a right entitled to the protection of the law and of the Constitution as much as are the rights to the possession of life, liberty, or property. Harris v. Nashville Trust Co. 128 Tenn. 573, 162 S. W. 584, 49 L.R.A.(N.S.) 897, Ann. Cas. 1914C, 885.

Among the most fundamental of personal rights is the right of personal security, including the preservation of a man's health from such practices as may prejudice or annoy it. Tomlinson v. Armour & Co. 75 N. J. L. 748, 70 A. 314, 19 L.R.A.(N.S.) 223.

include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may,[1] the right to labor, to contract, to terminate contracts,[2] to acquire property,[3] and the right to all our liberties, personal, civil, and political—in short, all that makes life worth living.[4]

In some of the authorities, the term "natural right" is sometimes referred to in cases in which litigants contend that such "natural rights" have been violated. It has been held that a citizen has no transcendent personal rights founded on instinctive nature in addition to the rights guaranteed by the written Constitution.[5] Elsewhere, sporadic expressions by the courts seem to indicate constitutional protection for rights termed "natural" in addition to rights protected under the specific guaranty safeguarding a person in his life, liberty, or pursuit of happiness. Thus, it has been said that a natural affection between the parents and offspring has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed.[6] As the term "natural rights" is generally used, however, it is probably meant to describe what are considered by the parties asserting such rights to be fundamental rights actually guaranteed by the Constitution, and not merely rights existing in addition to those so specifically guaranteed. In this sense no definite rule can be laid down as to what these so-called "natural rights" include. The best test is the gradual process of judicial determination by inclusion and exclusion.[7] Thus, it has been held that the right to beget children is a natural and constitutional right.[8] On the other hand, the right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law.[9] Similarly, the position has been taken that the right of serving as a juror is not a natural right, but one conferred or imposed by statute and which may be restricted, abridged, denied, or enlarged by the legislature.[10]

All rights guaranteed by the Constitutions, state and Federal, are subject to a proper, lawful, and reasonable exercise of the police power.[11]

1 Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Re Flukes, 157 Mo. 125, 57 S. W. 545, 51 L.R.A. 176, 80 Am. St. Rep. 619; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263.

2 Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176.

See infra, §§ 338, 339, 344, 346.

3 Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A. (N.S.) 338, 3 Ann. Cas. 263.

See infra, § 334.

4 Re Flukes, 157 Mo. 125, 57 S. W. 547, 51 L.R.A. 176, 80 Am. St. Rep. 619.

5 Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

6 Lacher v. Venus, 177 Wis. 558, 188 N. W. 613, 24 A.L.R. 403.

7 **Blackstone** has defined the absolute rights of individuals as those which are so in their primary and strictest sense, which would exist in a state of nature, and which every man is entitled to enjoy whether out of society or in it. Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

Natural rights defined by Blackstone "may be arranged under the following heads: (1) The right of personal security; (2) the right of personal liberty; and (3) the right to acquire and enjoy property. To these the distinguished commentator on American law has added a fourth head, which found no place under the English system, viz.: the free exercise and enjoyment of religious profession and worship." Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

8 Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515.

9 University of Mississippi v. Waugh, 105 Miss. 623, 62 So. 827, L.R.A.1915D, 588, Ann. Cas. 1916E, 522, affirmed in 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720.

10 People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N. E. 145, 71 A.L.R. 1327.

11 See supra, §§ 267 et seq.

§ 329. Generally.—It is a fundamental guaranty of American constitutional government that no person shall be deprived of his liberty without due process of law.[12] The liberty thus guaranteed by the Federal and state Constitutions is a very broad and extensive concept. Judicial interpretation has given to this word as so used its most comprehensive signification; it has been said to embrace every form and phase of individual right that is not necessarily taken away by some valid law for the common good.[13] In each of its phases it has its history and connotations.[14] Although the liberty protected by the Fourteenth Amendment consists mainly of the vital rights of a citizen as asserted at common law when the Constitution was adopted,[15] it is settled that the "liberty" safeguarded by the due process clause includes protection from violation for any of the fundamental conceptions of justice which lie at the base of our civil and political institutions. This concept of liberty contained in the Fourteenth Amendment is constantly enveloping the protection of more and more fundamental rights.[16] The right to liberty guaranteed by a Constitution includes the right to exist[17] and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual.[18] Moreover, the principles that embody the essence of constitutional liberty and security forbid all invasions, on the part of the government and its employees, of the sanctity of a man's home and the privacies of his life.[19]

In the consideration of the "liberty" guaranteed by the Fourteenth Amendment, one very important exception to usual doctrines must be kept in mind. Although the rule is well settled that a corporation is, generally speaking, a person within the meaning of the due process clause of the Amendment,[20] it is equally well settled that the liberty guaranteed under this amendment against deprivation without due process of law is a liberty of natural, and not artificial, persons.[1]

Liberty consists partially of the right to be free from arbitrary personal restraint or servitude.[2] In this sense it consists largely of freedom from arbitrary physical restraint.[3] Hence, the detaining by local health authorities, without clear and definite legislative authority, of a person suspected of having a venereal disease, for the purpose of forcing the exposure of his body to visual examination and compelling the extraction of blood from his veins in search of evidence of such disease, which may or may not exist, is a deprivation of liberty without due process of law.[4] Certain services, however, may be demanded of the individual by society without unconstitutionally depriving him of liberty. He may be required to do certain labors or to furnish a substitute to see that they are done.[5]

Personal liberty largely consists of the right of locomotion—to go where and when one pleases—only so far restrained as the rights of others may make it necessary for the welfare of all other citizens.[6] The right of a citizen to travel upon the public highways and to transport his property thereon, by horse-drawn carriage, wagon, or automobile, is not a mere privilege which may be permitted or prohibited at will, but a common right which he has under his right to life, liberty, and the pursuit of happiness.[7] Under this constitutional guaranty one may, therefore, under normal conditions, travel at his inclination along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in his safe conduct.[8]

The term "liberty," as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.[9] As the Supreme Court has stated, it

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[12] See supra, § 328.

[13] Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263.

The word "liberty," as used in the Constitution of the United States and the several states, means the right to do such acts as one may judge best for his interest, not inconsistent with the rights of others. Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878.

The refusal to permit one to bury the dead body of his relative or friend, except under an unreasonable limitation, unconstitutionally interferes with his private rights. Wyeth v. Board of Health (Wyeth v. Thomas) 200 Mass. 474, 86 N. E. 925, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439.

[14] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

[15] Sinclair v. State, 161 Miss. 142, 132 So. 581, 74 A.L.R. 241.

[16] See supra, § 311.

[17] Pavesich v. New England Mut. L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

[18] Ibid.

Personal liberty includes the right "to be let alone" to determine one's mode of life—whether it shall be a life of publicity or of privacy—and to order one's life and manage one's affairs in a manner that may be most agreeable to him, so long as he does not violate the rights of others or of the public. Ibid.

In other jurisdictions it has been held that the publication of one's photograph without his consent does not interfere with his constitutional right to liberty. Henry v. Cherry, 30 R. I. 13, 73 A. 97, 24 L.R.A. (N.S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

[19] Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 14 S. Ct. 1125, later report in 155 U. S. 3, 39 L. ed. 49, 15 S. Ct. 19.

[20] See CORPORATIONS.

[1] Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 S. Ct. 384; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 S. Ct. 126, 7 Ann. Cas. 1104.

[2] Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; Watertown v. Christnacht, 39 S. D. 290, 164 N. W. 62, L.R.A.1917F, 903; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550.

[3] Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

[4] Wragg v. Griffin, 185 Iowa, 243, 170 N. W. 400, 2 A.L.R. 1327.
Annotation: 2 A.L.R. 1333.

[5] Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 S. Ct. 258. See Henley v. State, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L.R.A. 126.

Liberty is not taken without due process of law, contrary to the Fourteenth Amendment, by laws making it a misdemeanor punishable by fine or imprisonment for any able-bodied male person between the ages of twenty-one and forty-five years to fail in any year to perform six days' labor on the highways of his county, when summoned, or to provide an able-bodied substitute or, in lieu thereof, pay $3 to the road overseer. Butler v. Perry, 240 U. S. 328, 60 L. ed. 672, 36 S. Ct. 258.

See HIGHWAYS, STREETS, AND SIDEWALKS [Also 13 R. C. L. p. 161, § 141].

[6] Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L.R.A. 507, 18 Am. St. Rep. 473; Watertown v. Christnacht, 39 S. D. 290, 164 N. W. 62, L.R.A. 1917F, 903.

[7] Slusher v. Safety Coach Transit Co. 229 Ky. 731, 17 S. W. (2d) 1012, 66 A.L.R. 1378; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A.L.R. 604.

[8] Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L.R.A. 507, 18 Am. St. Rep. 473. See St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30, 15 L.R.A.(N.S.) 973, 124 Am. St. Rep. 750 (loitering on the street).

[9] Grosjean v. American Press Co. 297 U. S. 233, 80 L. ed. 660, 56 S. Ct. 444; Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A.1917F, 514, Ann. Cas. 1917C, 643; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Pavesich v. New England Mut. L. Ins. Co. 122 Ga. 190, 50 S. E. 68, 69 L.R.A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663; McKinster v. Sager, 163 Ind. 671, 72 N. E. 854, 68 L.R.A. 273, 106 Am. St. Rep. 268; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Re Boyce, 27 Nev. 299, 75 P. 1, 65

therefore includes among others the right to entertain the belief and to teach the doctrine that war, training for war, and military training are immoral, wrong, and contrary to the precepts of Christianity,[10] the right to worship God according to the dictates of one's own conscience,[11] and the right to acquire useful knowledge, to marry, to establish a home and bring up children, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[12] It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion.[13] Within the meaning of the term "liberty"

L.R.A. 47, 1 Ann. Cas. 66; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Celina & M. County Teleph. Co. v. Union-Center Mut. Teleph. Asso. 102 Ohio St. 487, 133 N. E. 540, 21 A.L.R. 1145; Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109, 58 L.R.A. 654; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193; State v. Dalton, 22 R. I. 77, 46 A. 234, 48 L.R.A. 775, 84 Am. St. Rep. 818; Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Block v. Schwartz, 27 Utah, 387, 76 P. 22, 65 L.R.A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550; Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[10] Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197, rehearing denied in 293 U. S. 633, 79 L. ed. 717, 55 S. Ct. 345.

The enforcement of an order of the board of regents of a state university prescribing instruction in military science and tactics as a required course does not unconstitutionally deprive any person of liberty without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. Ibid.

[11] See supra, § 312.

[12] Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238.

Forbidding the teaching in school of any other than the English language until the pupil has passed the eighth grade violates the constitutional guaranty of liberty in the absence of sudden emergency rendering knowledge of the foreign language clearly harmful. Bartels v. Iowa, 262 U. S. 404, 67 L. ed. 1047, 43 S. Ct. 628; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446.

[13] **United States.**—Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A. 1917F, 1163, Ann. Cas. 1917D, 973; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 S. Ct. 126, 7 Ann. Cas. 1104 (recognizing rule); Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 S. Ct. 423; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383, affirming 14 Utah. 71, 46 P. 756, 37 L.R.A. 103; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652.

Alabama.—Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319.

Arkansas.—Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103.

California.—Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878.

Colorado.—Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269.

Georgia.—Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 41 S. E. 553, 57 L.R.A. 547, 90 Am. St. Rep. 126.

Idaho.—Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663.

Illinois.—People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L.R.A. 558; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L.R.A. 261, 75 Am. St. Rep. 93; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206.

Indiana. — Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Russell v. Pittsburgh, C. C. & St. L. R. Co. 157 Ind. 305, 61 N. E. 678, 55 L.R.A. 253, 87 Am. St. Rep. 214.

Kansas. — Ex parte Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; State v. Wilson, 101 Kan. 789, 168 P. 679, L.R.A.1918B, 374; State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369.

Kentucky. — Rawles v. Jenkins, 212 Ky. 287, 279 S. W. 350, citing R. C. L.

Louisiana. — State ex rel. Galle v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92.

Massachusetts.—Opinion of Justices, 271 Mass. 582, 171 N. E. 294, 69 A.L.R. 388; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838.

Minnesota. — State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548.

Mississippi. — State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495.

Missouri. — State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

Nebraska. — Hall v. State, 100 Neb. 84, 158 N. W. 362, L.R.A.1916F, 136.

Nevada. — Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A. (N.S.) 477, Ann. Cas. 1914A, 162; Re Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66.

New York. — Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A. (N.S.) 162, Ann. Cas. 1912B, 156; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; Wright v. Hart, 182 N. Y. 330, 75 N.E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

North Carolina. — State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472.

Oregon. — Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193.

Rhode Island. — Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590.

South Carolina. — Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410, overruled on another point in State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345.

South Dakota. — State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756.

Tennessee. — Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682.

Utah. — State v. Holtgreve, 58 Utah, 563, 200 P. 894, 26 A.L.R. 696.

Vermont. — State v. International Paper Co. 96 Vt. 506, 120 A. 900, 32 A.L.R. 632.

Washington. — State v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466; State v. Smith, 42 Wash. 237, 84 P. 851, 5 L.R.A.(N.S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798; Re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927.

West Virginia. — Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

Wisconsin. — State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

Annotation: 76 Am. St. Rep. 39; 86 Am. St. Rep. 375.

As to the right to a livelihood or vocation, see infra, § 336.

As to the right to contract, see infra, § 339.

is also included the right to buy and sell,[14] to select freely such tradesmen as the citizen himself may desire to patronize,[15] to manufacture,[16] to acquire property,[17] to live in a commuity,[18] to have a free and open market, the right of free speech, of self-defense against unlawful violence,[19] and, in general, the opportunity to do those things which are ordinarily done by free men.[20]

Many questions concerning the scope of the guaranty of liberty have risen in connection with regulations or litigation pertaining to children. Thus, it

[14] State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

[15] New Method Laundry Co. v. McCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022.

[16] New Orleans v. Toca, 141 La. 551, 75 So. 238, L.R.A.1917E, 761, Ann. Cas. 1918B, 1032.

[17] Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136.

[18] New Orleans v. Miller, 142 La. 163, 76 So. 596, L.R.A.1918B, 331.

Each person in a community has the essential right to live there in such place as he may choose provided he lives there in conformity with the laws of the land and does not engage in any occupation in his domicil which is prohibited by law. Ibid.

[19] State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789.

As to free speech, see supra, §§ 319 et seq.

[20] State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

has been held that a statutory attempt to confer upon a father the right to grant the custody of his minor children, to the exclusion of the supervision of the mother over them, violates the constitutional right of mother and child to liberty.[1] Liberty also includes not only the right to establish a home and bring up children[2] but also the right of the parent to educate his children in such manner as he deems best to secure their happiness and welfare, so long as such training or education does not result in, or tend to develop, tendencies or traits dangerous to society.[3] Therefore, requiring all children between the ages of eight and sixteen years to attend the public schools unconstitutionally interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.[4] Nevertheless, there is no unconstitutional restraint upon liberty or infringement upon happiness in depriving a child of the mere privilege of securing an education at the expense of the state until he is willing to submit to all reasonable regulations enacted for the purpose of permitting efficiency and maintaining discipline.[5] Forbidding pupils in a public school to affiliate with a fraternal society without the sanction of the school authorities does not unconstitutionally interfere with their personal rights.[6] If the parents fail to perform their natural duty to rear and educate the child so that it may be useful, intelligent, and moral, but permit it to become vicious and a menace to the rest of society, the state may assert its power as parens patriæ and apply curative measures in order to attempt to rectify such a condition.[7] It is well settled that to submit a delinquent child to proper restraint and guardianship does not deprive him of his liberty without due process of law.[8]

§ 330. Limitations.—In spite of the broad scope of the fundamental right of liberty[9] and the jealous protection by the Constitution of the rights of the individual,[10] liberty is not a right which is uncontrollable[11] or which is absolute under all circumstances and conditions.[12] It is liberty in a social organization,[13] and when one becomes a member of society, he necessarily parts with some privileges which, as an individual not affected by his relations to others, he might retain.[14] Hence, liberty does not signify unrestrained license to follow the dictates of an unbridled will.[15] One who is prevented from injuring another cannot justly assert that he has himself been deprived of any right.[16] It has been said that society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy[17] and that the liberty of one individual must necessarily be subject to the same right in all others.[18]

Constitutional liberty is always a relative term and, at most, means liberty regulated by just and impartial laws;[19] in other words, such liberty is natural liberty so far restrained by human laws as is necessary and expedient for the general advantage of the public.[20] It implies the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interests of the community.[1] When it is said that the liberty of

1 Ex parte Tillman, 84 S. C. 552, 66 S. E. 1049, 26 L.R.A.(N.S.) 781.

2 See supra, note 12, this section.

3 Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325.

4 Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468.

5 Flory v. Smith, 145 Va. 164, 134 S. E. 360, 48 A.L.R. 654.

6 Lee v. Hoffman, 182 Iowa, 1216, 166 N. W. 565, L.R.A.1918C, 933. See also Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720, affirming 105 Miss. 623, 62 So. 827, L.R.A.1915D, 588, Ann. Cas. 1916E, 522.

7 See JUVENILE COURTS AND OFFENDERS [Also PARENT AND CHILD, 20 R. C. L. p. 600, § 14].

8 Re Sharp, 15 Idaho, 120, 96 P. 563, 18 L.R.A.(N.S.) 886; Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L.R.A.(N.S.) 908, Ann. Cas. 1914A, 1222; Wissenburg v. Bradley, 209 Iowa, 813, 229 N. W. 205, 67 A.L.R. 1075; Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325; Ex parte Naccarat, 328 Mo. 722, 41 S. W. (2d) 176, 76 A.L.R. 654.

9 See supra, § 329.

10 State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798.

11 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330.

12 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 63; Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L.R.A.(N.S.) 908, Ann. Cas. 1914A, 1222; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773, reversed on other grounds in 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; State v. Sopher, 25 Utah, 318, 71 P. 482, 60 L.R.A. 468, 95 Am. St. Rep. 845; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496.

Annotation: 6 L.R.A. 621.

Individual liberty secured by the Federal Constitution does not import an absolute right in each person to be at all times and under all circumstances wholly freed from restraint. Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

13 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

14 Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

"Sir W. Blackstone says that every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase as the acquisition of social and municipal relations. Mr. Jefferson denied this doctrine, because he was of opinion that no man had a natural right to commit aggression on the equal rights of another, and that every man was under the natural duty of contributing to the necessities of society, and that no man had the natural right to be the judge between himself and another, but was bound to submit to the umpirage of an impartial third. This contrariety of opinion between Judge Blackstone and the American statesman is rather apparent than real, for Blackstone's definition of natural rights is far more comprehensive than Mr. Jefferson's. The former supposes 'natural liberty to consist properly in a power of acting as one thinks fit, without any restraint or control unless by the law of nature.' If this law of nature, as Mr. Jefferson thinks, comprehends those restrictions which 'the equal rights of others'—the duty of contributing to the necessities of society, and submitting to the decision of impartial judges, in disputes between individuals—would imply, there is no essential difference between the opinions alluded to." Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94.

15 Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586; Com. v. Karvonen, 219 Mass. 30, 106 N. E. 556, L.R.A.1915B, 706, Ann. Cas. 1916D, 846; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879; State Bd. of Health v. Greenville, 86 Ohio St. 1, 98 N. E. 1019, Ann. Cas. 1913D, 52.

16 Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L.R.A. 353.

17 Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; State v. Durein, 70 Kan. 1, 78 P. 152, 15 L.R.A.(N.S.) 908, affirmed in 208 U. S. 613, 52 L. ed. 645, 28 S. Ct. 567; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496.

18 Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586; Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 87 N. E. 504, 23 L.R.A.(N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; State v. Brown, 37 Wash. 97, 79 P. 635, 68 L.R.A. 889, 107 Am. St. Rep. 798; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

19 Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369, 44 L.R.A.(N.S.) 1039; Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586; Com. v. Karvonen, 219 Mass. 30, 106 N. E. 556, L.R.A.1915B, 706, Ann. Cas. 1916D, 846; Butte v. Paltrovich, 30 Mont. 18, 75 P. 521, 104 Am. St. Rep. 698.

20 Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L.R.A.(N.S.) 908, Ann. Cas. 1914A, 1222; Bryant v. Brown, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

1 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369, 44 L.R.A.(N.S.) 1039; State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 101 A.L.R. 810; State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957; Com. v. Karvonen, 219 Mass. 30, 106 N.E. 556, L.R.A. 1915B, 706, Ann. Cas. 1916D, 846; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; Re

the citizen includes freedom to use his faculties "in all lawful ways" and to earn his living by any "lawful" calling, the inquiry remains whether the particular calling or the particular way brought in question in a given case is lawful, that is, whether it is consistent with such rules of action as have been rightfully prescribed by the state.[2] Moreover, liberty does not imply the right of one man so to use his property as to endanger the property of others.[3]

§ 331. —Under Police Power.—In accordance with the general principle that all rights are subject to a proper exercise of the police power,[4] it is well settled that the possession and enjoyment by the individual of his right of liberty are subject to such reasonable regulations and restraints as may be imposed by the state in the exercise of the police power[5] in order to preserve the health, safety, morals, and welfare of the community.[6] Thus, without violat-

People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; State v. Mountain Timber Co. 75 Wash. 581, 135 P. 645, L.R.A.1917D, 10, affirmed in 243 U. S. 219, 61 L. ed. 685, 37 S. Ct. 260; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466. See Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 S. Ct. 235.

"In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great danger, be subject to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

As to liberty and the police power, see infra, § 331.

[2] Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425.

[3] Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 28 N. E. 76, 12 L.R.A. 652; Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94.

Under present methods of living, public necessity requires that the citizen be deprived of much of the freedom of use of his property that formerly seemed to inhere in its ownership. Cincinnati v. Vester (C. C. A. 6th) 33 F. (2d) 242, 68 A.L.R. 831, affirmed in 281 U. S. 439, 74 L. ed. 950, 50 S. Ct. 360.

As to regulation of the use of property under the police power, see supra, §§ 268, 269.

[4] See supra, § 267.

[5] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785; Waugh v. University of Mississippi, 237 U. S. 589, 59 L. ed. 1131, 35 S. Ct. 720, affirming 105 Miss. 623, 62 So. 827, L.R.A. 1915D, 588; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Evanston v. Wazau, 364 Ill. 198, 4 N. E. (2d) 78, 106 A.L.R. 789; People v. Johnson, 288 Ill. 442, 123 N. E. 543, 4 A.L.R. 1535; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A. (N.S.) 438, Ann. Cas. 1915A, 292; Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892, 45 L.R.A.(N.S.) 908, Ann. Cas. 1914A, 1222; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A. (N.S.) 879, Ann. Cas. 1915B, 659; Rosenbush v. Bernheimer, 211 Mass. 146, 97 N. E. 984, Ann. Cas. 1913A, 1317; Smith v. Wayne Probate Judge (Smith v. Command) 231 Mich. 409, 204 N. W. 140, 40 A.L.R. 515; Halter v. State, 74 Neb. 767, 105 N. W. 298, 7 L.R.A.(N.S.) 1079, 121 Am. St. Rep. 754, affirmed in 205 U. S. 34, 51 L. ed. 696, 27 S. Ct. 419, 10 Ann. Cas. 525; Carter v. Craig, 77 N. H. 200, 90 A. 590, 52 L.R.A.(N.S.) 211, Ann. Cas. 1914D, 1179; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 738; State v. Morse, 84 Vt. 387, 80 A. 189, 34 L.R.A.(N.S.) 190, Ann. Cas. 1913B, 215; Buck v. Bell, 143 Va. 310, 130 S. E. 516, 51 A.L.R. 855, affirmed in 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584; State ex rel. Webster v. Superior Ct. 67 Wash. 37, 120 P. 861, L.R.A.1915C, 287, Ann. Cas. 1913D, 78.

"Where a statute undertakes to impose restraints on liberty, it should be confined to the things generally comprehended within the police power." Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A.L.R. 1361.

Constitutional liberty is that measure of liberty consistent with the police power. State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

[6] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358; Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 43 L.R.A.(N.S.) 851; Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L.R.A. (N.S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; Re Viemeister, 179 N. Y. 235, 72 N. E. 97, 70 L.R.A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 689,

ing the constitutional guaranty of liberty, the state may forbid one to make use of polluted water for drinking purposes,[7] may provide for the sterilization of a feeble-minded inmate of a state institution who is the daughter of a feeble-minded mother and the mother of an illegitimate feeble-minded child,[8] may prohibit one, under penalty, from becoming a member of a secret, oath-bound association which has not filed a copy of its constitution, bylaws, rules, regulations, and oath of membership, and the roster of its membership,[9] and may prohibit the publication of information which would have a tendency to induce people to gamble.[10]

It seems to be generally agreed that the legislature in enacting a police regulation may include within the purview of the statute acts innocent in themselves where the inclusion of such acts is necessary in order to make the regulation effective.[11] Hence, in such matters a law may expressly prohibit and make criminal the doing of an act which, in the absence of such law, would constitute a right of liberty within the meaning of the Constitution, even though such act may not in itself be immoral.[12] Moreover, the rights of liberty and of the pursuit of happiness are not necessarily violated by laws prohibiting personal vices or habits which are generally conceded to be harmful, although these do not involve direct and immediate injury to others.[13]

It is often difficult to draw the line between the rights of the citizen to pursue and enjoy liberty and to seek and obtain happiness, on the one side, and the right of the state to enact laws in the general interests of all the people, on the other side.[14] The prevailing view is that individual rights must yield to proper and reasonable regulation imposed for the best interests of the entire community.[15]

The rule is well settled that through attempted police regulation the state cannot encroach on the proper liberty of the citizen[16] under the guise of regulating rights[17] by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.[18] The

52 Am. St. Rep. 707, writ of error dismissed in 170 U. S. 408, 42 L. ed. 1087, 18 S. Ct. 631; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L.R.A. 854; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496.

The several states are debarred by the Fourteenth Amendment from striking down personal liberty or materially restricting its normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A. 1915C, 960.

An individual may not justly complain of a reasonable legislative invasion of his usual rights or a reasonable legislative restriction of his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community. Re People (Title & Mortg. Guarantee Co.) 264 N. Y. 69, 190 N. E. 153, 96 A.L.R. 297.

[7] State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 581, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496.

[8] Buck v. Bell, 274 U. S. 200, 71 L. ed. 1000, 47 S. Ct. 584.

[9] New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R. 785, affirming 241 N. Y. 405, 150 N. E. 497, 43 A.L.R. 909.

[10] Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128.

[11] State v. Griffin, 69 N. H. 1, 39 A. 260, 41 L.R.A. 177, 76 Am. St. Rep. 139; MacLaren v. State, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55, 18 Ann. Cas. 826.

[12] Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229.

[13] Ah Lim v. Territory, 1 Wash. 156, 24 P. 588, 9 L.R.A. 395.

[14] Com. v. Libbey, 216 Mass. 356, 103 N. E. 923, 49 L.R.A.(N.S.) 879; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446.

See generally, supra, §§ 259 et seq.

[15] See supra, § 267.

[16] State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756.

[17] Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L.R.A. 895, 97 Am. St. Rep. 676; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L.R.A. 481, 53 Am. St. Rep. 557.

[18] Meyer v. Nebraska, 262 U. S. 390,

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power can be exercised to suppress, restrain, or regulate the liberty of individual action only when such action is injurious to the public welfare,[19] laws imposing restraints on personal liberty in the absence of some public necessity therefor cannot be sustained.[20] Furthermore, in exercising the police power, rights of liberty properly limitable may be limited only to the extent necessary to subserve the public interest.[1]

§ 332. Illustrations of Limitations.—The general principles as to limitations on the constitutional rights to life, liberty, and property have many important applications. Individuals may be deprived of life or liberty as punishment for crime.[2] Persons arrested for felony may be measured and photographed, according to the Bertillon system, by the police authorities.[3] Moreover, individual citizens do not have their rights impaired by being required to appear and furnish testimony.[4] Without in any way violating the constitutional guaranties as to liberty, a citizen may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk his life in its defense.[5] These are but a few out of many possible illustrations of the general principle that a statute does not deprive a citizen of his liberty in the constitutional sense simply because it imposes burdens, abridges freedom of action, regulates occupations, or subjects individuals to restraints in matters which affect public interests or the rights of others.[6]

67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446.

A statute should be declared unconstitutional if it invades personal rights to liberty and is not directed to the promotion of the general welfare, but is in evasion of the principles on which legislative action should be founded. Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L.R.A. 935, affirmed in 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358.

For general discussion, see supra, § 303.

[19] Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

Laws regulating conduct in matters of indifference are destructive of liberty. People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L.R.A. 721, 16 Am. St. Rep. 578.

[20] State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269.

A statute forbidding the publication of all information with respect to betting odds, after the event upon which the bet was laid, without regard to the question whether its tendency was harmful to the public or not, is an unconstitutional deprivation of liberty. Parkes v. Judge of Recorder's Ct. (Parkes v. Bartlett) 236 Mich. 460, 210 N. W. 492, 47 A.L.R. 1128. Annotation: 47 A.L.R. 1135.

Purely æsthetic purposes are not sufficient to justify interference with rights of liberty. People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A. (N.S.) 438, Ann. Cas. 1915A, 292; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A.1917F, 1050.

As to æsthetic considerations generally, see supra, § 280.

[1] Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

[2] Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; Mack v. State, 203 Ind. 355, 180 N. E. 279, 83 A.L.R. 1349; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

The Fourteenth Amendment to the Federal Constitution does not protect those liberties which civilized states regard as properly subject to regulation by its penal law. Whenever the state declares that certain acts theretofore legal shall constitute a crime, it removes such acts from the free field and brings them within the law. The effect of such a law is to restrict the liberty of those who desire to perform such acts, but if the law is within the police power of the state, it cannot be held unconstitutional merely because it restricts the liberty of a citizen by making unlawful acts which were formerly regarded as lawful. Hence the state may validly forbid prize fighting and boxing matches, except such as are permitted under license from the State Athletic Commission. Annotation: 83 A.L.R. 696, 697.

As to the constitutionality of the penalty of capital punishment in certain criminal cases, such as premeditated murder, as not depriving one of life or liberty without due process of law, see HOMICIDE.

[3] State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 57 N. E. 541, 50 L.R.A. 73, 77 Am. St. Rep. 511; Downs v. Swann, 111 Md. 53, 73 A. 653, 23 L.R.A.(N.S.) 739, 134 Am. St. Rep. 586.

Annotation: 134 Am. St. Rep. 592.

[4] Re Davies, 168 N. Y. 89, 61 N. E. 118, 56 L.R.A. 855.

[5] Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765.

See WAR [Also 27 R. C. L. p. 916, § 3].

[6] People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. Rep. 460.

§ 333. —Regulation of Disorderly Persons.—One field of legislation in which a conflict of opinion has arisen as to the proper balance between the rights of the community and of the individual consists of laws regulating the movements and conduct of prostitutes and other disorderly characters on the streets and in public places. In a few jurisdictions restrictive laws and ordinances have been upheld. For example, an ordinance prohibiting any prostitute from being on the streets or alleys of a city between the hours of seven o'clock P. M. and four o'clock A. M., without any reasonable necessity therefor, has been upheld as a valid exercise of the police power.[7] It has also been held that an ordinance prescribing limits in a city outside of which no woman of lewd character shall dwell may be a proper exercise of police power, at least when no attack is made on it except by owners of property in, or adjacent to, the prescribed limits.[8] On the other hand, the weight of authority is opposed to the recognition of any restrictions on the personal liberty or movements of any members of the community, even if they are such as are commonly termed immoral persons.[9] Thus, an ordinance forbidding association with thieves or prostitutes with intent to agree to commit any offense or to cheat any person has been held to be an unconstitutional invasion of the right of personal liberty.[10] An ordinance passed for the same purpose has been declared unconstitutional on the ground of unreasonable discrimination in making it unlawful for any person to associate or converse with any female known as a common prostitute on any of the streets or alleys of the city, except her husband, father, brother, or other male relative; the court being of the opinion that there could be no good reason in exempting any other male relative than the husband, father, or brother from its provisions or for failing to give her mother and sister the same privilege allowed to the father and brother, and that in any event any person should be allowed to converse with her long enough to transact any necessary legitimate business.[11] An attempt by a municipal corporation to prohibit loitering on the streets, so far as applied to persons conducting themselves in a peaceable, orderly manner, disturbing no one, and committing no overt act, is an interference with the constitutional rights of personal liberty.[12]

3. PROPERTY

§ 334. Generally.—The Fifth Amendment to the Federal Constitution prevents the Federal Government or its agencies from depriving any person of his property without due process of law. The Fourteenth Amendment to the Federal Constitution, and all the various state Constitutions, prevent any action by a state which would accomplish such deprivation.[13] The term "property" in its strict legal sense means the right of dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects.[14] It has even been so defined in a state Constitution.[15]

affirmed in 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468.

[7] Dunn v. Com. 105 Ky. 834, 49 S. W. 813, 43 L.R.A. 701, 88 Am. St. Rep. 344.

[8] L'Hote v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 S. Ct. 788.

[9] Milliken v. Weatherford, 54 Tex. 388, 38 Am. Rep. 629.

[10] Ex parte Smith, 135 Mo. 223, 36 S. W. 628, 33 L.R.A. 606, 58 Am. St. Rep. 576; Watertown v. Christnacht, 39 S. D. 290, 164 N. W. 62, L.R.A.1917F, 903.

[11] Hechinger v. Maysville, 22 Ky. L. Rep. 486, 57 S. W. 619, 49 L.R.A. 114.

[12] St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30, 15 L.R.A.(N.S.) 973, 124 Am. St. Rep. 750; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L.R.A. 529.

Annotation: 15 L.R.A.(N.S.) 973; Ann. Cas. 1912B, 1185.

[13] See infra, Vol. 12, Subd. XIV.

[14] See PROPERTY [Also 22 R. C. L. p. 37, § 2].

[15] Winchester v. Ring, 312 Ill. 544, 144

The general meaning assigned to the term in cases involving constitutional questions is similar in import.[16] The word "property" in the Fourteenth Amendment embraces all valuable interests which a man may possess outside of himself—outside of his life and liberty.[17] It is more than the mere thing which a person owns; it includes the right to acquire, use, and dispose of it, and the Constitution, in the Fourteenth Amendment, protects these essential attributes.[18] The guaranty refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto.[19] It relates not only to those tangible things of which one may be the owner, but to everything which he may have of an exchangeable value.[20] The right of property has been also defined as the right to acquire, possess, and enjoy particular things and objects in any way consistent with the equal rights of others and the just exactions and demands of the state.[21]

Specific examples of inclusion and exclusion furnish a criterion of what judicial position may be taken. The courts have held that, in the constitutional sense, property includes valid contracts,[1] franchises[2] and the right to charge

N. E. 333, 36 A.L.R. 520; Chicago v. Wells, 236 Ill. 129, 86 N. E. 197, 23 L.R.A.(N.S.) 405, 127 Am. St. Rep. 282.

16 See cases infra, notes 17–1, this section.

17 Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 209 (per Bradley, J., dissenting).

18 Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16, L.R.A.1918C, 210, Ann. Cas. 1918A, 1201; Hall v. Geiger-Jones Co. 242 U. S. 539, 61 L. ed. 480, 37 S. Ct. 217, L.R.A. 1917F, 514, Ann. Cas. 1917C, 643; State Street Furniture Co. v. Armour, 345 Ill. 160, 177 N. E. 702, 76 A.L.R. 1298; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116; Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279; Helier v. Lutz, 254 Mo. 704, 164 S. W. 123, L.R.A.1915B, 191; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

Annotation: 23 L.R.A.(N.S.) 405.

The property rights in land protected by the Constitution include the right to use, lease, and dispose of it for all lawful purposes. Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15.

The property of a private eleemosynary corporation, although charged with the maintenance of a college or other "public charity," is private property, within the meaning and protection of that clause of Ohio Const. Art. 1, § 19, which declares that "private property shall ever be held inviolate." State ex rel. White v. Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L.R.A. 409.

19 Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; Herlihy v. Donohue, 52 Mont. 601, 161 P. 164, L.R.A.1917B, 702, Ann. Cas. 1917C, 29; Hall v. State, 100 Neb. 84, 158 N. W. 362, L.R.A.1916F, 136.

20 Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L.R.A. 70, 46 Am. St. Rep. 348; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 75 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

21 Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Berthoff v. O'Reilly, 74 N. Y. 599, 30 Am. Rep. 323; Waters v. Wolf, 162 Pa. 153, 29 A. 646, 42 Am. St. Rep. 815.

Judicial interpretation has given the word "property," as used in the Constitutions, its most comprehensive signification, so that it embraces every form and phase of individual right that is not necessarily taken away by some valid law for the public good. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263.

1 Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

Valid contracts are property and as such are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States. Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840.

The rights acquired by a municipal water supply company under a contract for the exclusive right to supply the municipality with water for a specified time, and for the purchase by the municipality of the system at a specified price at the termination of the period specified, are property within the protection of the Federal Constitution. Superior Water, Light & P. Co. v. Superior, 263 U. S. 125, 68 L. ed. 204, 44 S. Ct. 82.

2 Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235; Kansas Gas & E. Co. v. Independence (C. C. A. 10th) 79 F. (2d) 32, 100 A.L.R. 1479; Ingersoll v. Nassau Electric R. Co. 157 N. Y. 453, 52 N. E. 545, 43 L.R.A. 236.

The right to operate a cotton gin and **collect tolls** therefor under a statute declaring such business to be a public utility, to be permitted only in case of public necessity, is not a mere license, but is a franchise granted in consideration of the performance of public service, and constitutes property within the protection of the Fourteenth Amendment to the Federal Constitution. Frost v. Corporation Commission, 278 U. S. 515, 73 L. ed. 483, 49 S. Ct. 235.

and collect tolls for transportation,[3] the right to retain a lien until the debt secured thereby is paid,[4] judgments and rights acquired thereby,[5] hides of cattle,[6] and intoxicating liquor.[7] On the other hand, the courts have held many intangible rights not to be property within the constitutional meaning of the term.[8] The right to hold or maintain a public office constitutes the outstanding instance where the courts have refused to permit constitutional protection in this sense.[9] The right of custody of a child, aside from the child's ability or inability to perform services, is not a right of property.[10] The liberal extension of the idea of property to include choses in action and incorporeal rights does not extend to a defense to a promise or obligation to pay a debt where such defense arises from a lapse of time coupled with the bar of a statute of limitations.[11]

There is an important distinction between liberty and property with respect to the protection included in the Fourteenth Amendment, as far as the persons who may invoke the constitutional guaranties of due process are concerned; for although corporations cannot invoke the "liberty" concept for their own protection, since they are not natural persons,[12] they are fully entitled to the protection of the due process clause in their property or property rights.[13]

§ 335. Nature of Right Guaranteed.—The right of property is a fundamental,[14] natural,[15] inherent,[16] and inalienable right.[17] It is not ex gratia from

3 Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 59 P. 1051, 48 L.R.A. 251, 78 Am. St. Rep. 328.

4 Security-First Nat. Bank v. Rindge Land & Nav. Co. (C. C. A. 9th) 85 F. (2d) 557, 86 F. (2d) 3, 107 A.L.R. 1240, writ of certiorari denied in 299 U. S. 613, 81 L. ed. 452, 57 S. Ct. 315, which has rehearing denied in 300 U. S. 686, 81 L. ed. 888, 57 S. Ct. 430. See also Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106.

5 Collins v. Welsh (C. C. A. 9th) 75 F. (2d) 894, 99 A.L.R. 1319, writ of certiorari denied in 295 U. S. 762, 79 L. ed. 1704, 55 S. Ct. 921; Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470; Springstun v. Springstun, 131 Wash. 109, 229 P. 14, 40 A.L.R. 595; Bettman v. Cowley, 19 Wash. 207, 53 P. 53, 40 L.R.A. 815.

6 State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75.

7 Ex parte Francis (State ex rel. Frances v. Moran) 76 Fla. 304, 79 So. 753, 2 A.L.R. 1068; State v. Williams, 146 N. C. 618, 61 N. E. 61, 17 L.R.A.(N.S.) 299, 14 Ann. Cas. 562.

8 See cases cited infra, notes 9–11, this section.

9 See infra, Vol. 12, Subd. XIV.

10 Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L.R.A.1918E, 587.

11 Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 209.

12 See supra, § 329.

13 Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468.

"Appellees are corporations, and therefore it is said they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But they have business and property for which they claim protection. . . . And this court has gone very far to protect against loss [threatened by legislation which results in action destroying such rights]." Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468.

See CORPORATIONS.

14 Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Lawrence E. Tierney Coal Co. v. Smith (Lawrence E. Tierney Coal Co. v. Kash) 180 Ky. 815, 203 S. W. 731, 4 A.L.R. 1540; Stone v. Jefferson, 317 Mo. 1, 293 S. W. 780, 52 A.L.R. 879; Herlihy v. Donohue, 52 Mont. 601, 161 P. 164, L.R.A. 1917B, 702, Ann. Cas. 1917C, 29; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356, overruled on another point in Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

15 Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

16 Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857.

17 Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Cason v. Florida Power Co. 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034.

the legislature, but ex debito from the Constitution.[18] In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them.[19] It is sometimes characterized judicially as a sacred right,[20] the protection of which is one of the most important objects of government.[1]

The right of property is very broad and embraces practically all incidents which property may manifest.[2] Within this right are included the right to acquire,[3] hold, enjoy,[4] possess,[5] use,[6] manage,[7] insure,[8] and improve property.[9] A very important incident of the right of property is the right to dispose of it.[10] Thus, the right to buy, sell, barter, and exchange property is a necessary incident to its ownership and, subject to reasonable regulation, is as much protected by the Constitution as is the ownership itself;[11] the right to fix the price at which property shall be sold is, under ordinary circumstances, an attribute of the property.[12] Furthermore, the state cannot violate the right of disposal by legislative fiat, transferring one man's property to another.[13]

It has been held in a few jurisdictions that the right to transmit property by inheritance to one's descendants or next of kin is "property," within the meaning of the constitutional provision that a person shall not be deprived of property except by judgment of his peers or by the law of the land.[14] The view usually taken, however, is that the right to give or take property is not one of those natural or inalienable rights which are supposed to precede all government and which no government can rightfully impair.[15]

The rights to make contracts,[16] to engage in business,[17] and to labor[18] are all embraced in the property right protected by the due process clauses. The right to acquire property includes the right to acquire it by labor and, in a broad sense, also embraces the right to labor.[19]

4. Business or Occupation

§ 336. Generally.—The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution;[20] such protection is particularly found in the guaranties of the Fourteenth Amendment.[21] It has been said that the preservation of such right is the principal purpose of the Constitution itself[22] and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.[23] The right is fundamental,[24] natural,[25] inherent,[1] and inalienable,[2] and is one

18 Vanhorne v. Dorrance (C. C.) 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857.

19 Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279; Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

"The ancient and established maxims of Anglo-Saxon law which protect the fundamental rights in the use, enjoyment, and disposal of private property are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history—the record of the struggle against tyranny, the overseership of prefects, and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men." Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A.L.R. 1387.

20 Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276; Fitzhugh v. Jackson, 132 Miss. 585, 97 So. 190, 33 A.L.R. 279; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274.

All property is equally sacred in the view of the Constitution. Eidge v. Bessemer, 164 Ala. 599, 51 So. 246, 26 L.R.A.(N.S.) 394.

1 Schiller Piano Co. v. Illinois Northern Utilities Co. 288 Ill. 580, 123 N. E. 631, 11 A.L.R. 454; Watson v. Mississippi River Power Co. 174 Iowa, 23, 156 N. W. 188, L.R.A.1916D, 101; Third Nat. Bank v. Divine Grocery Co. 97 Tenn. 603, 37 S. W. 390, 34 L.R.A. 445.

2 See cases cited infra, notes 3–13, this section.

3 Cap F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; State ex rel. Davis v. Stuart, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Woolf v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; Perrin's Appeal, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912; Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A.(N.S.) 855; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198.

A state law which should undertake to deprive any class of persons of the general power to acquire property would be invalid. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

4 Sterling v. Constantin, 287 U. S. 378, 77 L. ed. 375, 53 S. Ct. 190; Watson v. Mississippi River Power Co. 174 Iowa, 23, 156 N. W. 188, L.R.A.1916D, 101; Herlihy v. Donohue, 52 Mont. 601, 161 P. 164, L.R.A.1917B, 702, Ann. Cas. 1917C, 29; Park v. State, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156.

5 Watson v. Mississippi River Power Co. 174 Iowa, 23, 156 N. W. 188, L.R.A.1916D, 101; Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A.(N.S.) 855; State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L.R.A. 847.

6 Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210, 49 S. Ct. 50, 86 A.L.R. 654; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Willison v. Cooke, 54 Colo. 330, 130 P. 828, 44 L.R.A.(N.S.) 1030; People v. Ericsson, 263 Ill. 368, 105 N. E. 315, Ann. Cas. 1915C, 183, L.R.A.1915D, 607; DeBlanc v. New Iberia, 106 La. 680, 31 So. 311, 56 L.R.A. 285; Byrne v. Maryland Realty Co. 129 Md. 202, 98 A. 547, L.R.A.1917A, 1216; State ex rel. Lachtman v. Houghton, 134 Minn. 226, 158 N. W. 1017, L.R.A. 1917F, 1050; State v. Park, 42 Nev. 386, 178 P. 389, 3 A.L.R. 75; People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L.R.A. 490, 68 Am. St. Rep. 736.

As to the regulation of the use of property under the police power, see supra, §§ 268, 269.

7 State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

8 Kusnetsky v. Security Ins. Co. 313 Mo. 143, 281 S. W. 47, 45 A.L.R. 189.

9 Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156, 25 L.R.A. 621; White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 P. 497, 44 L.R.A.(N.S.) 254.

No one has a right to compel another to have his property improved in a particular manner; it is as illegal to force him to receive a benefit as to submit to an injury. White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 P. 497, 44 L.R.A.(N.S.) 254.

10 Carey v. Atlanta, 143 Ga. 192, 84 S. E. 456, L.R.A.1915D, 684, Ann. Cas. 1916E, 1151; Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111, 44 L.R.A.(N.S.) 228, Ann. Cas. 1914B, 824; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70; Saville v. Corless, 46 Utah, 495, 151 P. 51, L.R.A.1916A, 651, Ann. Cas. 1918D, 198.

The right to transfer property in payment of a debt when solvent is within the constitutional protection of property rights. Third Nat. Bank v. Divine Grocery Co. 97 Tenn. 603, 37 S. W. 390, 34 L.R.A. 445.

11 State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 120 Ind. 575, 22 N. E. 778, 6 L.R.A. 579; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 94 N. E. 1065, 35 L.R.A.(N.S.) 1079.

An owner is deprived of property, within the meaning of the Constitution, by taking away one of the incidents of ownership, when he is deprived of the right to expose it for sale and sell it. Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707, 48 L.R.A. 261, 75 Am. St. Rep. 93.

12 Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718, 47 S. Ct. 426, 58 A.L.R. 1236.

See supra, § 282.

13 See infra, § 375.

14 Stratton v. Morris, 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

15 State v. Mollier, 96 Kan. 514, 152 P. 771, L.R.A.1916C, 551.

For detailed discussion, see Descent and Distribution [Also 9 R. C. L. p. 13, §§ 7, 8]; Wills [Also 28 R. C. L. p. 63, § 10].

16 See infra, § 339.

17 See infra, § 336.

18 See infra, § 338.

19 See infra, §§ 338, 344.

20 Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Roraback v. Motion Picture Mach. Operators Union, 140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A.L.R. 1290; Seattle v. Proctor, 183 Wash. 293, 48 P. (2d) 238, citing R. C. L.; Northwestern Nat. Ins. Co. v. Fishback, 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507.

21 New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371.

22 Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840.

23 Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332.

24 Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Brown v. Jacobs' Pharmacy Co. 115 Ga. 429, 41 S. E. 553, 57 L.R.A. 547, 90 Am. St. Rep. 126; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 1118, 63 L.R.A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756.

25 Re Leach, 134 Ind. 665, 34 N. E. 641, 21 L.R.A. 701.

1 Fiscal Ct. v. F. & A. Cox Co. 132 Ky. 738, 117 S. W. 296, 21 L.R.A.(N.S.) 83.

2 Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Fiscal Ct. v. F. & A. Cox Co. 132 Ky. 738, 117 S. W. 296, 21 L.R.A.(N.S.) 83.

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of the most sacred[3] and most valuable rights of a citizen.[4] A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law[5] and is also included in the right to liberty and the pursuit of happiness.[7]

The right of a person to pursue a calling, consistent with proper and reasonable police regulations which the particular situation may sanction,[8] cannot be taken away by legislative enactment.[9] The common businesses and callings of life, the ordinary trades and pursuits which are innocent in themselves and which have been followed in all communities from time immemorial, must, therefore, be free in the United States to all alike upon the same terms.[10] Any person is at liberty to pursue any lawful calling,[11] under such restrictions as are imposed upon all persons of the same age, sex, and condition.[12] It is not competent, generally speaking, to forbid any person or class of persons, whether citizens or resident aliens, to offer their services in lawful business or to subject others to penalties for employing them.[13] Moreover, it has been

[3] Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790.
As to the right as a privilege and immunity of citizenship, see Vol. 12, Subd. XII.

[4] Seattle v. Proctor, 183 Wash. 293, 48 P. (2d) 238, citing R. C. L.

[5] Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Sparks v. McCreary, 156 Ala. 382, 47 So. 332, 22 L.R.A.(N.S.) 1224; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Brown v. Jacobs Pharmacy Co. 115 Ga. 429, 41 S. E. 553, 57 L.R.A. 547, 90 Am. St. Rep. 126; Carpenters' Union v. Citizens' Committee, 333 Ill. 225, 164 N. E. 393, 63 A.L.R. 157; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Lawton v. Stewart Dry Goods Co. 197 Ky. 394, 247 S. W. 14, 26 A.L.R. 686; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82, 52 A.L.R. 1125; Rorabuck v. Motion Picture Mach. Operators' Union, 140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A.L.R. 1290; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L.R.A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Colonial Laundries v. Henry, 48 R. I. 332, 138 A. 47, 54 A.L.R. 343; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; State Medical Examiners v. Friedman, 150 Tenn. 152, 263 S. W. 75, citing R. C. L.; Northwestern Nat. Ins. Co. v. Fishback, 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

The right to conduct a lawful business is a property right protected by the common law. A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82, 52 A.L.R. 1125.

[6] Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, 36 S. Ct. 7, L.R.A.1916D, 545, Ann. Cas. 1917B, 283; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A. 1915D, 677, Ann. Cas. 1915D, 420; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 S. Ct. 992, 1257; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. ed. 394; Sparks v. McCreary, 156 Ala. 382, 47 So. 332, 22 L.R.A.(N.S.) 1224; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; State v. Armstrong, 38 Idaho, 493, 225 P. 491, 33 A.L.R. 835; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1662; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 477, Ann. Cas. 1913A, 254; New Orleans v. Texas & P. R. Co. 141 La. 551, 75 So. 238, L.R.A.1917E, 787, Ann. Cas. 1918B, 1032; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 851, 37 A.L.R. 864; Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Moyer v. Memphis, 136 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

In a broad sense, whatever prevents a man from following a useful calling is an invasion of his liberty. People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L.R.A. 653, 52 Am. St. Rep. 707, writ of error dismissed for want of jurisdiction in 170 U. S. 408, 42 L. ed. 1087, 18 S. Ct. 631.

All laws which limit one in his choice of a trade or profession or confine him to a specified locality are infringements upon his fundamental rights of liberty. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A. (N.S.) 338, 3 Ann. Cas. 263; People v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763; Re Jacobs, 98 N.Y. 98, 50 Am. Rep. 636.

Any interference with the right to form partnerships for the conduct of business is an unwarranted interference with individual freedom condemned by the Constitution. Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790.

[7] Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Ex parte Hayden, 147 Cal. 649, 82 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; People v. Love, 298 Ill. 304, 131 N. E. 809, 16 A.L.R. 703; People v. Steele, 231 Ill. 340, 83 N. E. 226, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Wyeth v. Board of Health, 200 Mass. 474, 86 N. E. 925, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439; State ex rel. Short v. Riedell, 109 Okla. 35, 233 P. 684, 42 A.L.R. 765; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[8] See infra, § 337.

[9] New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371; Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L.R.A. 553; State ex rel. Barrett v. Boeckeler Lumber Co. 301 Mo. 445, 256 S. W. 175 (concurring opinion of White, J., on motion to modify) citing R. C. L.; Hall v. State, 100 Neb. 84, 158 N. W. 362, L.R.A.1916F, 136; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L.R.A.1915F, 840.

No one can be deprived of the right to engage in honest toil in any vocation and in any manner he sees proper, in order to make a living for himself and those who may be dependent on him, so long as he does not use such right in a manner to injure others. Replogle v. Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A.L.R. 1333.

Unreasonable or arbitrary interference with, or restrictions on, the common right to engage in a lawful private business such as the manufacture and sale of ice cannot be saved from the condemnation of the Fourteenth Amendment by calling them experimental. New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 747, 52 S. Ct. 371.

[10] Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509, 34 L.R.A.(N.S.) 890; Brennan v. United Hatters, 73 N. J. L. 729, 65 A. 165, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; People ex rel. Stafford v. Travis, 231 N. Y. 339, 132 N. E. 109, 15 A.L.R. 1319; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790; Welch v. Maryland Casualty Co. 47 Okla. 293, 147 P. 1046, L.R.A.1915E, 708; State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L.R.A. 477, 44 Am. St. Rep. 756; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

Every man has the right freely to engage in such lawful business and occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part. Connors v. Connolly, 86 Conn. 641, 86 A. 609, 45 L.R.A.(N.S.) 564.

[11] Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Ex parte Kuback, 85 Cal. 274, 24 P. 737, 9 L.R.A. 482, 20 Am. St. Rep. 226; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L.R.A.1916C, 775, Ann. Cas. 1917C, 1065; Shaw v. Marshalltown, 131 Iowa, 128, 104 N. W. 1121, 10 L.R.A.(N.S.) 825, 9 Ann. Cas. 1039; State v. New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70, 2 Ann. Cas. 92; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L.R.A. 151, 81 Am. St. Rep. 368; Hall v. State, 100 Neb. 84, 158 N. W. 362, L.R.A.1916F, 136; Wolff v. Fuller, 87 N. H. 64, 174 A. 193, 94 A.L.R. 1067; State v. Ramseyer, 73 N. H. 31, 58 A. 958, 6 Ann. Cas. 445; Brennan v. United Hatters, 73 N. J. L. 729, 65 A. 165, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 79 N. E. 836, 12 L.R.A.(N.S.) 707; People v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; State v. Moore, 113 N. C. 697, 18 S. E. 342, 22 L.R.A. 472; Jordon v. State, 51 Tex. Crim. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 10 S. E. 288, 6 L.R.A. 359, 25 Am. St. Rep. 891; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[12] Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 S. Ct. 652; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; People v. Health Dept. 189 N. Y. 187, 82 N. E. 187, 13 L.R.A.(N.S.) 894; Welch v. Maryland Casualty Co. 47 Okla. 293, 147 P. 1046, L.R.A.1915E, 708.

As to limitations on occupations, see supra, §§ 275, 284 et seq.

As to the equality of such regulations, see Vol. 12, Subd. XIII.

[13] Ex parte Kubach, 85 Cal. 274, 24 P. 737, 9 L.R.A. 482, 20 Am. St. Rep. 226, Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269.

held that the right to choose one's occupation includes the right to be free from unlawful interference or control in the conduct of it.[14]

The granting of monopolies or exclusive privileges to corporations or persons is an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty,[15] but the Fourteenth Amendment does not protect a business against the hazards of competition.[16]

§ 337. Police Restrictions as to Persons Engaged in.—Since it is a universal rule that every business or occupation itself is subject to proper police regulation for the public interest,[17] it logically follows that the right of every person to pursue a business, occupation, or profession is subject to the paramount right of the government as a part of its police power to impose such restrictions and regulations as the protection of the public may require.[18] The Constitution does not secure the liberty to conduct a business so as to injure the public at large or any substantial group.[19] The right of reasonable regulation is a modification of the sweeping generalization that every person has a right to pursue any lawful calling.[20] Restrictions and regulations may be imposed within proper limits without in any way impairing the fundamental right to engage in occupations.[21] Thus, the state may demand skill requisite with the subject matter involved for public protection in those

14 Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L.R.A. 181, 76 Am. St. Rep. 30.
As to the extent of control of business under the police power, see supra, §§ 284 et seq.

15 People ex rel. Tyroler v. Warden, 157 N. Y. 116, 51 N. E. 1006, 43 L.R.A. 264, 68 Am. St. Rep. 763.

16 Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. ed. 259, 55 S. Ct. 7.

17 See supra, § 284.

18 Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 S. Ct. 493, 18 Ann. Cas. 865; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 S. Ct. 633; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L.R.A. 558; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; State ex rel. Ebert v. Loden, 117 Md. 373, 83 A. 564, 40 L.R.A.(N.S.) 193, Ann. Cas. 1913E, 1300; Com. v. Beaulieu, 213 Mass. 138, 99 N. E. 955, Ann. Cas. 1913E, 1080; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; Vicksburg v. Mullane, 106 Miss. 199, 63 So. 412, 50 L.R.A.(N.S.) 421; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; Moler v. Whisman, 243 Mo. 571, 147 S. W. 985, 40 L.R.A.(N.S.) 629, Ann. Cas. 1913D, 392; People v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, affirmed in 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Oil City v. Oil City Trust Co. 151 Pa. 454, 25 A. 124, 31 Am. St. Rep. 770; Waid v. Ft. Worth (Tex. Civ. App.) 258 S. W. 1114, citing R. C. L.
Since the public interest is the basis of such police legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420.
As to the scope of the police power of the state over occupations, see supra, §§ 284 et seq.
As to legislative discretion, see supra, § 305.

19 Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469.
The Federal Constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all within its jurisdiction. Broadnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238.

20 Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878; Balker v. Hood, 53 Kan. 499, 36 P. 1115, 24 L.R.A. 854; State v. Knowles, 90 Md. 646, 45 A. 877, 49 L.R.A. 695; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; State v. State Medical Examining Bd. 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; Ex parte McCloskey, 82 Tex. Crim. Rep. 531, 199 S. W. 1101 (affirmed in 252 U. S. 107, 64 L. ed. 481, 40 S. Ct. 306) citing R. C. L.; Reaves Warehouse Corp. v. Com. 141 Va. 194, 126 S. E. 87 (writ of error dismissed in 271 U. S. 690, 70 L. ed. 1154, 46 S. Ct. 481) citing R. C. L.; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930; State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

21 Com. v. Strauss, 191 Mass. 545, 78 N. E. 136, 11 L.R.A.(N.S.) 968, 6 Ann. Cas. 842; State v. Haworka, 109 Minn. 249, 110 N. W. 870, 8 L.R.A.(N.S.) 1272, 10 Ann. Cas. 398; People v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L.R.A.(N.S.) 859, 5 Ann. Cas. 325; Waid v. Ft. Worth (Tex. Civ. App.) 258 S. W. 1114, citing R. C. L.

callings in which incapacity would injuriously affect the public.[22] Licenses may be required before persons are permitted to engage in certain callings, even though the question of capability is not particularly applicable, where other public interests are involved.[23] Some businesses may be permitted to be operated only by corporations. Others may be restricted so that only natural persons are permitted to engage in them.[24]

In accordance with the principle that inasmuch as social and economic conditions change, the power to regulate businesses may constitutionally exist where it formerly did not,[25] whenever, through changed social conditions or otherwise, a business becomes essentially public in character and assumes proportions, takes on features, or is attended by consequences which make free participation in it destructive of the ends for which it is pursued and a menace to the welfare of society, the state may, in the absence of constitutional prohibitions, protect itself by limiting the right to engage in such business as far as may be necessary to attain the desired security.[1] It may suppress altogether any business or calling which is in itself injurious and cannot be so regulated that it will not be detrimental to the public welfare.[2]

The right to regulate participation in occupations is subject within certain limits to review by the courts.[3] Unless an act restricting the participation of the citizen in ordinary occupations can be shown to fall within the police power, such act is void as violating the constitutional right of the citizen to liberty and the pursuit of happiness;[4] the legislature cannot prohibit any person or class of persons from engaging in a lawful business which is not injurious to others.[5] A statute restricting the conduct of a business to those who are engaged principally in that business is invalid if there is nothing in the calling which demands any special training or knowledge not readily acquired by any business man.[6] Similarly, membership in an association cannot be required as a prerequisite to admission to an ordinary business which is in its nature perfectly legitimate.[7]

§ 338. Labor as Right of Employee and Employer.—The right to labor and to its protection from unlawful interference is a constitutional as well as a

22 See supra, § 275.

23 See supra, §§ 275, 290.

24 See supra, § 290.

25 See supra, § 284.

1 Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L.R.A.(N.S.) 877, Ann. Cas. 1913A, 254.
See also Vol. 12, Subd. XIII.

2 See supra, §§ 291, 292.

3 Ex parte Drexel, 147 Cal. 763, 32 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136.
See supra, § 305.

4 Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086.

5 Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. ed. 204, 49 S. Ct. 57; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927; State v. Kartus, 230 Ala. 352, 162 So. 533, 101 A.L.R. 1336; Cap. F. Bourland Ice Co. v. Franklin Utilities Co. 180 Ark. 770, 22 S. W. (2d) 993, 68 A.L.R. 1018; Frost v. Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L.R.A. 659, 52 Am. St. Rep. 365; Kusnetcky v. Security Ins. Co. 313 Mo. 143, 281 S. W. 47, 45 A.L.R. 189; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260; State v. Buchanan, 29 Wash. 602, 70 P. 52, 59 L.R.A. 342, 92 Am. St. Rep. 930.
"The city has no power to declare all retail stores nuisances per se when it is within the common knowledge of all persons they are not so in fact." People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L.R.A.(N.S.) 438, Ann. Cas. 1915A, 292.
The state may not prohibit the lawful, common, and ordinary business of purchasing milk or cream. People v. Beakes Dairy Co. 222 N. Y. 416, 119 N. E. 115, 3 A.L.R. 1260.

6 Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 100 N. E. 52, 42 L.R.A.(N.S.) 1139, Ann. Cas. 1914B, 263.

7 Munson v. Colorado Springs, 35 Colo. 506, 84 P. 683, 6 L.R.A.(N.S.) 432, 9 Ann. Cas. 970.
Annotation: 6 L.R.A.(N.S.) 433.

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common-law right.[8] Every man has a natural right to the fruits of his own industry.[9]

Labor as a commodity[10] is deemed to be property,[11] especially within the meaning of constitutional guaranties.[12] Thus, the right to acquire property includes the right to acquire property by labor.[13] Furthermore, the laborer has the same right to sell his labor as any other property owner.[14]

Labor is also included in the concept of liberty.[15] An artisan has the legal right to dispose of his own labor according to his own will,[16] because every

[8] Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, 109 N. E. 643, L.R.A.1916C, 218; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 330.

[9] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132, 51 L.R.A.(N.S.) 958, Ann. Cas. 1915D, 1188; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Cheek v. Prudential Ins. Co. (Mo.) 192 S. W. 387, L.R.A.1918A, 166; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L.R.A. 689, 65 Am. St. Rep. 785; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616; Re Broad, 36 Wash. 449, 78 P. 1004, 70 L.R.A. 1011, 2 Ann. Cas. 212; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[10] State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546.

[11] The Antelope, 10 Wheat. (U. S.) 66, 6 L. ed. 268; New Method Laundry Co. v. McCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Kelley v. Judge of Recorder's Ct. (Kelley v. Boyne) 239 Mich. 204, 214 N. W. 316, 53 A.L.R. 273; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, affirmed in 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A. (N.S.) 603, 14 Ann. Cas. 616.

[12] Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82, 52 A.L.R. 1125; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Marymont v. Nevada State Bkg. Bd. 33 Nev. 333, 111 P. 295, 32 L.R.A.(N.S.) 477, Ann. Cas. 1914A, 162; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66.

The right to earn a living is a property right guaranteed by the Federal Constitution. Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

The right to earn wages is just as much property within the protection of due process as earned wages. Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 841, 37 A.L.R. 864.

The right of access by employees to the employing market is a property right. A. T. Stearns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82, 52 A.L.R. 1125.

[13] State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 442.

The right to labor in any calling or profession in the future may be considered a property right, for the purpose of protection, but no right exists as to labor or services already rendered, and there is nothing to protect, except the right of recovering due compensation therefor. Gleason v. Thaw (C. C. A. 3d) 185 F. 345, 34 L.R.A.(N.S.) 894.

[14] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; New Method Laundry Co. v. McCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Carpenters' Union v. Citizens Committee, 333 Ill. 225, 164 N. E. 393, 63 A.L.R. 157; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Jefferson & I. Coal Co. v. Marks, 287 Pa. 171, 134 A. 430, 47 A.L.R. 745; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616; Re Broad, 36 Wash. 449, 78 P. 1004, 70 L.R.A. 1011, 2 Ann. Cas. 212; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

A citizen may sell his labor for what he thinks best—whether money or goods—just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently is vicious and void. Johnson v. Goodyear Min. Co. 127 Cal. 4, 59 P. 304, 47 L.R.A. 338, 78 Am. St. Rep. 17.

As to contracts relating to labor, see infra, § 344.

[15] Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420 (holding that arbitrary tests cannot be imposed by which competent persons would be excluded from lawful employment); Cheek v. Prudential Ins. Co. (Mo.) 192 S. W. 387, L.R.A.1918A, 166.

[16] Meier v. Speer, 96 Ark. 618, 132 S. W. 988, 32 L.R.A.(N.S.) 792; Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Carlson v. Carpenter Contractors' Asso. 305 Ill. 331, 137 N. E. 222, 27 A.L.R. 625.

man has the right to labor or refuse to labor for another. He may base a refusal so to work on any grounds he may choose, even on mere whim, prejudice, or malice.[17]

The constitutional protection of labor extends to both the parties involved, for the employer is safeguarded as well as the employee.[18] The right to labor or to employ labor upon such terms as may be agreed upon is a property right,[19] is incident to the freedom of the individual,[20] and is as fully protected by the law as any other personal or private right.[1] It cannot be interfered with by the legislature except upon some reasonable ground.[2]

5. Contract

a. In General

§ 339. Generally.—Liberty of contract is a broad concept which has been held to envelop a variety of situations; like other rights guaranteed by the due process clause, it is incapable of exact or precise definition.[3] The Supreme Court has stated that freedom to contract is the essence of freedom from undue restraint on the right to contract.[4] Other courts have stated that the liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed.[5] The mere fact that contracts are involved in and of itself discloses that cases involving freedom to enter into them may arise in almost an indefinite multiplicity of situations, since the process of contracting takes place constantly because of the many relationships which make up organized society. Thus, as one specific example, the right to mortgage one's property is within the constitutional guaranty of freedom of contract.[6] Many of the most important constitutional questions concerning liberty of contract arise in connection with legislation affecting contracts of employment.[7]

The right of liberty of contract is inherent and inalienable.[8] It belongs to

[17] Arthur v. Oakes (C. C. A. 7th) 63 F. 310, 25 L.R.A. 414; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936.

[18] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, 38 S. Ct. 65, L.R.A.1918C, 497, Ann. Cas. 1918B, 461; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315.

[19] State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A. 1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043.

[20] State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043.

[1] Re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am. St. Rep. 269; Connors v. Connolly, 86 Conn. 641, 86 A. 600, 45 L.R.A. (N.S.) 564; Singer v. State, 72 Md. 464, 19 A. 1044, 8 L.R.A. 551; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 10 S. E. 288, 6 L.R.A. 359, 25 Am. St. Rep. 891; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

[2] State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261.

[3] See infra, notes 4–7, this section.

[4] Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 31 S. Ct. 502, 34 L.R.A.(N.S.) 834, Ann. Cas. 1912D, 734.

[5] St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; Seattle High School Chapter v. Sharples, 159 Wash. 424, 293 P. 994, 72 A.L.R. 1215.

[6] Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

A statute limiting the right to enforce a debt secured by mortgage to that property mortgaged, whether realty or chattels, is an undue restraint upon the liberty of a citizen to contract with respect to his property rights. Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

[7] See infra, §§ 344 et seq.

[8] Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 S. Ct. 586; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; State ex rel. Collins v. Senatobia Blank Book & Stationery Co. 115 Miss. 254, 76 So. 258, Ann. Cas. 1918B, 953; Lindsley v. Patterson (Mo.) 177 S. W. 826, L.R.A.1915F, 680; Shohoney v. Quincy,

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every citizen by the law of the land;[9] every man has the right freely to deal, or to refuse to deal, with his fellow men.[10] This principle has even been applied to corporations in one holding. The court stated that a mandatory statutory provision requiring insurance companies entering the field of workmen's compensation insurance to accept all applications for such insurance, and in effect to waive the right as to selection of risks, violates the guaranty of freedom of contract.[11] The position has been taken by some courts that the liberty to contract is not a fundamental constitutional right.[12] It has been said that the right of liberty of contract differs from a fundamental constitutional right, from the right of liberty of the body or person, from the right of property, including the obligation of existing contracts, from the right of equality, and from the right of political liberty in that it is not a vested right, a right of definite content, or a right protected by specific constitutional guaranties.[13] Elsewhere the position has been taken that liberty of contract is a fundamental right.[14]

Liberty of contract is universally recognized and conceded to be within the protection of the Fourteenth Amendment[15] and the Fifth Amendment to the

O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Huskie v. Griffin, 75 N. H. 345, 74 A. 595, 27 L.R.A.(N.S.) 966, 139 Am. St. Rep. 718; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; State v. Robins, 71 Ohio St. 273, 73 N. E. 470, 69 L.R.A. 427, 2 Ann. Cas. 485; Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109, 58 L.R.A. 654; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; St. Louis S. W. R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L.R.A.1917B, 1108; State v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174.

All men can modify their property rights by contract, but no man can bargain away his right to contract at all concerning property, for that right is inalienable. Lawrence v. Rutland R. Co. 80 Vt. 370, 67 A. 1091, 15 L.R.A.(N.S.) 350, 13 Ann. Cas. 475.

[9] State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[10] Federal Trade Commission v. Raymond Bros.-Clark Co. 263 U. S. 565, 68 L. ed. 448, 44 S. Ct. 162, 30 A.L.R. 1114; Green v. Victor Talking Mach. Co. (C. C. A. 2d) 24 F. (2d) 378, 59 A.L.R. 1091, writ of certiorari denied in 278 U. S. 602, 73 L. ed. 530, 49 S. Ct. 9; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Crane Ice Cream Co. v. Terminal Freezing & Heating Co. 147 Md. 588, 128 A. 280, 39 A.L.R. 1184; H. D. Watts Co. v. American Bond & Mortg. Co. 267 Mass. 541, 166 N. E. 713, 84 A.L.R. 12; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93; Com. v. Hunt, 4 Met. (Mass.) 111, 38 Am. Dec. 346; Germania F. Ins. Co. v. Home Ins. Co. 144 N. Y. 195, 30 N. E. 77, 26 L.R.A. 591, 43 Am. St. Rep. 749; McMaster v. Ford Motor Co. 122 S. C. 244, 115 S. E. 244, 29 A.L.R. 230.

A person cannot be forced to do a thing which he did not agree to do because it is like, and no more burdensome than, something which he did contract to do. Crane Ice Cream Co. v. Terminal Freezing & Heating Co. 147 Md. 588, 126 A. 280, 39 A.L.R. 1184.

Imposing a penalty on the publisher of any newspaper who refuses to publish, on request, at regular rates for space taken, the findings of the minimum wage commission, impairs his constitutional right of contract. Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1.

[11] Employers' Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320, 107 A.L.R. 1413.

Annotation: 107 A.L.R. 1422.

In some jurisdictions the position has been taken that an insurance company writing compensation insurance under the provisions of the Workmen's Compensation Act has no right to reject the application of an employer who is qualified under the act to carry compensation insurance. Annotation: 107 A.L.R. 1422.

[12] United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88; State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851.

[13] State v. J. J. Newman Lumber Co. 102 Miss. 802, 103 Miss. 263, 59 So. 923, 60 So. 215, 45 L.R.A.(N.S.) 851; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[14] Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L.R.A.(N.S.) 20, affirmed in 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829.

[15] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Morehead v. New York, 298 U. S. 587, 80 L. ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445, rehearing denied in 299 U. S. 619, 81 L. ed. 456, 57 S. Ct. 4; Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 87 A.L.R. 285; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71

Constitution of the United States.[16] It is also safeguarded by the state Constitutions.[17] In general it may be said that the privilege of contracting is both a liberty and a property right.[18] The right of a citizen of the United States resident in one state to contract in another is also a privilege protected by the privileges and immunities clause of the Fourteenth Amendment.[19]

The free and untrammeled right to contract is a part of the liberty guar-

L. ed. 893, 47 S. Ct. 506, 52 A.L.R. 163; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; Employers' Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320, 107 A.L.R. 1413; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Carpenters' Union v. Citizens' Committee, 333 Ill. 225, 164 N. E. 393, 63 A.L.R. 157; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229; Street v. Varney Electrical Supply Co. 160 Ind. 338, 66 N. E. 895, 61 L.R.A. 154, 98 Am. St. Rep. 325; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81, 76 A.L.R. 238; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Sneath v. Lehsten, 120 N. J. Eq. 327, 185 A. 55, citing R. C. L.; Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863, 63 A.L.R. 188; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 74 N. E. 561, 70 L.R.A. 722, 108 Am. St. Rep. 790; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; Merchants' State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, 182 N. W. 263, 14 A.L.R. 1353; Steele, H. & M. Co. v. Miller, 99 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 996; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193; State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

The constitutional right to freedom of contract is infringed by an ordinance forbidding one, without license and giving of bond, to contract to lay concrete sidewalks. State ex rel. Sampson v. Sheridan, 25 Wyo. 347, 170 P. 1, 1 A.L.R. 955.

[16] Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

[17] Ex parte Hayden, 147 Cal. 649, 83 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; Merchants State Bank v. Sawyer Farmers' Co-op. Asso. 47 N. D. 375, 182 N. W. 263, 14 A.L.R. 1353.

[18] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; Charles J. Off & Co. v. Morehead, 235 Ill. 40, 85 N. E. 264, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434; People v. Altschul, 231 Ill. 340, 83 N. E. 236, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927, 99 Am. St. Rep. 240; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L.R.A. 73, 95 Am. St. Rep. 241; Harding v. People, 160 Ill. 459, 43 N. E. 624, 32 L.R.A. 445, 52 Am. St. Rep. 344; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Sneath v. Lehsten, 120 N. J. Eq. 327, 185 A. 55, citing R. C. L.; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; Waters v. Wolf, 162 Pa. 153, 29 A. 646, 42 Am. St. Rep. 815; State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534.

The legislature can no more make a contract for parties without their consent than it can take away a vested right or impair the obligation of a contract already made. Stephens v. Hicks 156 N. C. 239, 72 S. E. 313, 36 L.R.A.(N.S.) 354, Ann. Cas. 1913A, 272.

[19] See Vol. 12, Subd. XII.

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anteed to every citizen.[20] The term "freedom of contract" does not appear in the Constitution;[21] it is always, however, embraced in the meaning of "liberty" as employed in due process clauses.[1] Liberty of contract is also safeguarded by a constitutional guaranty of pursuit of happiness.[2]

The right to contract is a property right protected by both the state and Federal Constitutions.[3] This guaranty is not in express words, but the pro-

20 Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468; Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, 37 S. Ct. 662, L.R.A.1917F, 1163, Ann. Cas. 1917D, 973; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 S. Ct. 128; Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 44 L. ed. 560, 20 S. Ct. 385; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663; Re Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119; State v. Armstead, 103 Miss. 799, 60 So. 778, Ann. Cas. 1915B, 495; State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 22 S. W. 350, 21 L.R.A. 789; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; Minton v. Early, 183 N. C. 199, 111 S. E. 347, citing R. C. L.; Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313, 36 L.R.A.(N.S.) 354, Ann. Cas. 1913A, 272; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; Merchants' State Bank v. Sawyer Farmers Co-op. Asso. 47 N. D. 375, 182 N. W. 263, 14 A.L.R. 1353; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A. 1916C, 1023, Ann. Cas. 1917C, 926; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S. W. (2d) 1067, 96 A.L.R. 802.

Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 465, 21 Eng. Rul. Cas. 696.

21 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

1 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L.R.A.(N.S.) 338, 3 Ann. Cas. 263; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

2 Ex parte Hayden, 147 Cal. 649, 83 P. 315, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

3 Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 969; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Tucson v. Stewart, 45 Ariz. 36, 40 P. (2d) 72, 96 A.L.R. 1492; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109; Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L.R.A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Frazer v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A.L.R. 1086; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L.R.A. 325, 31 Am. St. Rep. 533; Lindsley v. Patterson (Mo.) 177 S. W. 826, L.R.A. 1915F, 680; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A.L.R. 551, 92 A.L.R. 1450; Brennan v. United Hatters, 73 N. J. L. 729, 65 A. 165, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; Re Steube, 91 Ohio St. 135, 110 N. E. 250, L.R.A.1916E, 377; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 65 N. E. 885, 59 L.R.A. 775, 93 Am. St. Rep. 670; Crouch v. Central Labor Council, 134 Or. 612, 293 P. 729, 83 A.L.R. 193; Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A. (N.S.) 855; Waters v. Wolf, 162 Pa. 153, 29 A. 646, 42 Am. St. Rep. 815; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302; Watertown Milk Producers Co-op. Asso. v. Van Camp Packing Co. 199 Wis. 379, 225 N. W. 209, 226 N. W. 378, 77 A.L.R. 391.

tection exists as a necessary inference from the express guaranty of property rights.[4] The privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property is also said to embrace the right to make all proper contracts in relation thereto.[5]

Liberty of contract is not necessarily violated by legislation indirectly operating as a deterrent because it restricts dealings which may have become associated with a contract.[6] A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.[7]

§ 340. Exceptions.—The general rule that all persons possess a liberty of contract guaranteed from interference, which is based solely upon the very nature of the person so attempting to contract or to desist from contract,[8] is subject to several exceptions. The exceptions, however, are not uniformly applicable and, moreover, do not seem to be universally recognized.[9] The first exception relates to private corporations. Although it is obvious that the legislature cannot take the right to contract from corporations because such right is essential to their existence, it can narrow or regulate the right so long as the general power of corporations to make contracts is not rendered ineffectual.[10] In many instances laws have, therefore, been held valid which tend to restrict corporations from making certain kinds of contracts which natural persons could not possibly be constitutionally forbidden to make under the same circumstances.[11] Corporations do not possess liberty in the strict sense as guaranteed by due process,[12] although they are embraced among the persons to whom property protection is afforded by such clause of the Constitution.[13] The power of a corporation to contract, however, is not property such that it cannot be limited by the legislature, where there is general power to amend or repeal charters.[14] Corporations derive their power of contract from the legislature; and if power is reserved to amend corporate charters, statutes regulating contracts in certain respects between corporations and individuals may be enacted. Moreover, since the corporations are

The right to make a reasonable contract with reference to the use of a thing is an attribute of property and a property right. Bailey v. People, 190 Ill. 28, 60 N. E. 98, 54 L.R.A. 838, 83 Am. St. Rep. 116.

The legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. Stimson Mill Co. v. Braun, 136 Cal. 122, 68 P. 481, 57 L.R.A. 726, 89 Am. St. Rep. 116.

4 McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706.

5 McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Booth v. People, 186 Ill. 43, 57 N. E. 798, 50 L.R.A. 762, 78 Am. St. Rep. 229, affirmed in 184 U. S. 425, 46 L. ed. 623, 22 S. Ct. 425; Underhill v. Murphy, 117 Ky. 640, 78 S. W. 482, 111 Am. St. Rep. 262, 4 Ann. Cas. 780; Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A.(N.S.) 855.

6 Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. ed. 772, 56 S. Ct. 513.

7 Ibid.

8 See supra, § 339.

9 See infra, notes 10–20, this section.

10 Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A. (N.S.) 1097; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A. (N.S.) 706, affirmed on second appeal in 138 Iowa, 664, 116 N. W. 801, affirmed in 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259.

11 St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 S. Ct. 419; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042.

See also Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Kusnetsky v. Security Ins. Co. 313 Mo. 143, 281 S. W. 47, 45 A.L.R. 189.

12 See supra, § 329.

13 See supra, § 334.

14 State v. Brown & S. Mfg. Co. 18 R. I. 16, 25 A. 246, 17 L.R.A. 856.

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artificial bodies and possess only such powers as are granted to them, natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may enter into contracts with such corporations other than those contracts which the corporations are authorized to make.[15] In one case, on the other hand, where it was sought by statute to compel a corporation to enter into certain contracts against its will, the court took the position that a state may prohibit a foreign company from entering the state, but if it permits it to enter, it must not impose conditions which require the relinquishment of the right to select the persons with whom it may enter into contracts, which the court apparently regarded as a constitutional right even in the case of a corporation.[16] If the limitation of the power to contract goes to the subject matter of the contract itself rather than to the persons restricted from contracting, corporations may be validly limited without reservation of the power to amend their charters in the same way that natural persons are restricted under the statute. Such a situation arises primarily with respect to restrictive police measures.[17]

The second exception relates to corporations, quasi corporations, or agencies which are public in nature and derive their powers from the legislature. It has been held that freedom of contract does not operate in behalf of governmental agencies and political subdivisions so as to inhibit the legislature from limiting or prohibiting their right of contract.[18] A conclusion opposite in result, however, has been reached in a decision in which it has been held that the state has no right to interfere with and control by compulsory legislation the action of municipal corporations with respect to contract rights of exclusively local concern, as in contracts between a city and private contractors, by defining working conditions under which such a contractor's employees must be hired.[19]

As a third exception to the general principle, it is well settled that the constitutional guaranty of liberty of contract does not apply to children of tender years.[20] This seems to follow not only from the point of the protection of children who are wards of the state to a certain extent, but also from the simple point that if a child of tender years has no capacity even to enter into contracts such as would be involved in the problems concerned, he has no liberty of contract to be infringed by regulations.[1]

§ 341. Limitations.—The general rule is well settled that the right to make contracts is not absolute.[2] There is no absolute freedom to contract as one

15 Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042.

16 Employers' Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320, 107 A.L.R. 1413.
See also infra, note 19, this section.

17 See infra, § 342.

18 Trenton v. New Jersey, 262 U. S. 182, 67 L. ed. 937, 43 S. Ct. 534, 29 A.L.R. 1471; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337.
As to the right to regulate contracts relating to public works, see PUBLIC WORKS AND CONTRACTS [Also 22 R. C. L. p. 635, §§ 38 et seq.].

19 People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L.R.A. 814, 82 Am. St. Rep. 605
But see Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 S. Ct. 124.

20 Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S. W. 887, 12 A.L.R. 1208; Starnes v. Albion Mfg. Co. 147 N. C. 556, 61 S. E. 525, 17 L.R.A.(N.S.) 602, 15 Ann. Cas. 470.

1 See Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042, in which the court stated that there can be no violation of the Constitution in the denial of the right of contract to those who are incapable of binding themselves thereby.

2 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284

chooses,[3] for the liberty of contract guaranteed by the Constitution, like the general concept of liberty thus guaranteed,[4] is freedom from arbitrary restraint, not immunity from reasonable regulation[5] imposed in the interest of the community.[6] Hence, the right is relative to many conditions of time,

U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Louisville & N. R. Co. v. Scott, 219 U. S. 209, 55 L. ed. 183, 31 S. Ct. 171; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 S. Ct. 358, 3 Ann. Cas. 765; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 S. Ct. 419; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 S. Ct. 281; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 S. Ct. 536; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 S. Ct. 13; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 108 N. W. 902, 33 L.R.A.(N.S.) 706; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; State v. J. J. Newman Lumber Co. 102 Miss. 852, 59 So. 923, 45 L.R.A.(N.S.) 851; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; State v. Gateway Mortuaries, 87 Mont. 285, 287 P. 156, 68 A.L.R. 1512; Ex parte Boyce, 27 Nev. 299, 75 P. 1, 65 L.R.A. 47, 1 Ann. Cas. 66; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L.R.A.(N.S.) 201; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Pittsburgh, C. C. & St. L. R. Co. v. Kinney, 95 Ohio St. 64, 115 N. E. 505, L.R.A.1917D, 641, Ann. Cas. 1918B, 286; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A. 1916C, 1023, Ann. Cas. 1917C, 926; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; Prata Undertaking Co. v. State Bd. of Embalmings, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Myers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; Leeper v. State, 103 Tenn. 500, 52 S. W. 962, 48 L.R.A. 167; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796; State Bd. of Health v. St. Johnsbury, 82 Vt. 276, 73 A. 531, 23 L.R.A.(N.S.) 766, 18 Ann. Cas. 496; Lawrence v. Rutland R. Co. 80 Vt. 370, 67 A. 1091, 15 L.R.A.(N.S.) 350, 13 Ann. Cas. 475; State v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174.
Annotation: 122 Am. St. Rep. 904.

3 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A.1915E, 902, Ann. Cas. 1915A, 1018; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290.

4 See supra, § 330.

5 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Liberty Warehouse Co. v. Burley Tobacco Growers Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A. 1915F, 829; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Newnan v. Atlanta Laundries, 174 Ga. 99, 162 S. E. 497, 87 A.L.R. 507, appeal dismissed in 286 U. S. 526, 76 L. ed. 1269, 52 S. Ct. 495; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L.R.A.(N.S.) 466.
"Liberty under the Constitution is necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular." West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

6 Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Pittsburgh, C. C. & St. L. R. Co. v. Kinney, 95 Ohio St. 64, 115 N. E. 505, L.R.A. 1917D, 641, Ann. Cas. 1918B, 286.

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place, and circumstance[7] and is subject to reasonable limitations.[8] In every case where limitations are sought to be imposed, it must be remembered that freedom of contract is the general rule and restraint the exception,[9] and that the exercise of legislative authority to abridge freedom of contract can be justified only by the existence of exceptional circumstances.[10] Moreover, while the right to contract may be subject to limitations growing out of the duties which the individual owes to society, the public, or the government, the power of the legislature to limit such right must always rest on some reasonable basis and cannot be arbitrarily exercised.[11] Thus, Congress cannot abridge freedom of contract under a statute which is not actually within the purview of interstate commerce, and a law purporting to regulate

[7] Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392. See also West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

[8] Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso. 276 U. S. 71, 72 L. ed. 473, 48 S. Ct. 291; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 S. Ct. 66; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103; Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, 80 S. E. 327, L.R.A. 1915E, 902, Ann. Cas. 1915A, 1018; Scottish American Mortg. Co. v. Minidoka County, 47 Idaho, 33, 272 P. 498, 65 A.L.R. 663; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; State v. Fairmont Creamery Co. 153 Iowa, 702, 133 N. W. 895, 42 L.R.A.(N.S.) 821; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; State v. Schlitz Brewing Co. 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 245, 32 S. W. 5, 28 L.R.A. 796.

The legislature may not interfere with the absolute individual right to contract, except on the ground of public policy, but it may regulate the manner in which that right shall be exercised. Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A.(N.S.) 855.

[9] Morehead v. New York, 298 U. S. 587, 80 L. ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445, rehearing denied in 299 U. S. 619, 81 L. ed. 456, 57 S. Ct. 4; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[10] Morehead v. New York, 298 U. S. 587, 80 L. ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445, rehearing denied in 299 U. S. 619, 81 L. ed. 456, 57 S. Ct. 4; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[11] Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.(N.S.) 588, 3 Ann. Cas. 878; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; Re Preston, 63 Ohio St. 428, 59 N. E. 101, 52 L.R.A. 523, 81 Am. St. Rep. 642; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88.

A statute which permits the brakeman to act as conductor and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent denies to many the liberty of contract granted to brakemen and is unreasonable and void. Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420.

such liberty under the mere guise of regulating interstate commerce is invalid.[12] This principle also applies with full force and vigor to attempted state regulation under the guise of the police power.[13]

Concerning the general nature of the limitations which may be imposed upon liberty of contract, the Supreme Court has stated that the power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to affect injuriously the public interests; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons.[14] It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts.[15] Hence, it may deny the right to contract to those who are incapable of binding themselves thereby, or it may prohibit the making of contracts when it becomes necessary to protect the rights of others.[16] For example, it may deny to all the right to contract for the purchase or sale of lottery tickets, and to the minor the right to assume any obligations except for the necessaries of existence.[17] The constitutional right to contract may not, therefore, be invoked to guarantee a supposed right of one to make or enter into contracts which are illegal and properly forbidden,[18] contracts against public policy,[19] and many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the states or, in certain cases, by Congress without violating the constitutional guaranty of liberty of contract.[20]

Congress may regulate the making and performance of contracts whenever reasonably necessary to effect any of the great purposes for which the National Government was created.[1] For example, in the regulation of commerce with

[12] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764.

[13] See infra, § 342.

[14] Louisville & N. R. Co. v. Scott, 219 U. S. 209, 55 L. ed. 183, 31 S. Ct. 171; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7.

[15] Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Boone v. State, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A. 1917D, 15, Ann. Cas. 1917E, 803; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N. W. 714, 42 A.L.R. 548; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A. 1916C, 1023, Ann. Cas. 1917C, 926; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854; State ex rel. Ornstein v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174, writ of error dismissed in 204 U. S. 669, 51 L. ed. 672, 27 S. Ct. 788.

[16] Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864.

[17] Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 S. Ct. 586; Boone v. State, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517; Sanning v. Cincinnati, 81 Ohio St. 142, 90 N. E. 125, 25 L.R.A.(N.S.) 686; State ex rel. Ornstein v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174.

[18] Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789.

[19] Louisville & N. R. Co. v. Scott, 219 U. S. 209, 55 L. ed. 183, 31 S. Ct. 171; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657, 15 S. Ct. 586.

Annotation: 21 L.R.A. 798.

[20] United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25.

[1] Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Moyers v. Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854.

"Liberty of contract does not imply liberty in a corporation or individuals to defy

foreign nations and among the several states Congress may circumscribe the individual's liberty of contract.[2] Congress may also regulate the making and performance of contracts in the exercise of its wartime powers.[3]

The states may regulate and limit liberty of contract provided that the limitations imposed are reasonable.[4] Such state regulation is generally exercised by means of the police power for the promotion of the health, safety, morals, and welfare of the inhabitants of the states.[5] Under state action, therefore, the right of contract may, within constitutional limits, be abridged, enlarged, or destroyed.[6] Thus, a state may limit the making of certain contracts within its territory;[7] it may prohibit and declare invalid the making of certain contracts within its borders,[8] for the Fourteenth Amendment does

the national will, when legally expressed." Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436.

2 Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 32 S. Ct. 589; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 S. Ct. 621; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 S. Ct. 265, 34 L.R.A.(N.S.) 671; Louisville & N. R. Co. v. Scott, 219 U. S. 209, 55 L. ed. 183, 31 S. Ct. 171; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 S. Ct. 163; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 S. Ct. 155; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 S. Ct. 436; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 S. Ct. 349; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 S. Ct. 321; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; Brotherhood of R. Shop Crafts v. Lowden (C. C. A. 10th) 86 F. (2d) 458, 108 A.L.R. 1128, writ of certiorari denied in 300 U. S. 659, 81 L. ed. 868, 57 S. Ct. 435; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Stewart v. W. T. Rawleigh Medical Co. 58 Okla. 344, 159 P. 1187, L.R.A. 1917A, 1276.

The provision in the Constitution regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution; and the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states. The court cannot enlarge the scope of the language of the Constitution regarding the liberty of the citizen so as to hold that it includes or was intended to include a right to make a contract which in fact restrains and regulates interstate commerce if Congress, proceeding under the constitutional provision giving it the power to regulate that commerce, has prohibited such contracts. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96.

See COMMERCE, supra, p. 31, § 31.

3 Highland v. Russell Car & Snow Plow Co. 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314.

4 Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 S. Ct. 612, L.R.A.1915C, 1189; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 S. Ct. 592; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L.R.A. 576, 16 Am. St. Rep. 396; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864.

The power of the legislature to regulate a business for the protection of the public carries with it the power to control and regulate the right to contract in relation to it. State ex rel. Ornstein v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L.R.A.(N.S.) 174.

5 See infra, § 342.

6 Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

7 Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772.

The legislature, so far as its regulations are valid, not being arbitrary or unrelated to a proper purpose, may prevent them from being nullified by prohibiting contracts which, by modification or waiver, would alter or impair the obligation imposed. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 34 S. Ct. 259.

8 Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701.

not guarantee to the citizen the right to make any contract within a state, either directly or indirectly, where the making thereof is constitutionally forbidden by such state;[9] it may prohibit performance within its borders of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws;[10] and it may require certain mandatory obligations in connection with the contracts involved in contractors' bonds or with other similar matters arising in relation to construction or materialmen's liens.[11]

§ 342. —Under Police Power.—It is a well-settled rule that the right of contract is subject to certain limitations which the state may lawfully impose in the exercise of its police power[12] for the promotion of the health,

9 Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 S. Ct. 821; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207; Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

Freedom of contract vouchsafed by the Fourteenth Amendment is not infringed by treating the bond given by a city treasurer as a statutory bond and disregarding as surplusage an attempted exemption therein, contrary to statute and ordinance, of liability in respect of deposit of public funds. Jones v. Hadfield, — Ark. —, 96 S. W. (2d) 959, 109 A.L.R. 488 (on rehearing).

10 Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701.

11 Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co. 291 U. S. 352, 78 L. ed. 840, 54 S. Ct. 392; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 S. Ct. 576; United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88.

See BUILDING AND CONSTRUCTION CONTRACTS, Vol. 9, p. 64, § 99.

See MECHANICS' LIENS [Also 18 R. C. L. p. 874, § 3].

12 **United States.**—West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. ed. 306, 53 S. Ct. 133, 87 A.L.R. 285; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Packer Corp. v. State, 285 U. S. 105, 76 L. ed. 643, 52 S. Ct. 273, 79 A.L.R. 546; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. ed. 679, 36 S. Ct. 370, L.R.A.1917A, 421; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960 (recognizing rule); Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 S. Ct. 27, Ann. Cas. 1914B, 71; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 S. Ct. 66; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 599; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; Broadnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 S. Ct. 238; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 S. Ct. 535; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 159; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133 (recognizing rule); Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383.

Alabama.—Boone v. State, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065.

Arkansas.—Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109 (writ of error dismissed in 159 U. S. 267, 40 L. ed. 142, 15 S. Ct. 1042) (giving many examples).

California.—Haas v. Greenwald, 196 Cal. 236, 237 P. 38, 59 A.L.R. 1493, affirmed in 275 U. S. 490, 72 L. ed. 389, 48 S. Ct. 33; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301.

Indiana.—Knight & J. Co. v. Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Street v. Varney Electrical Supply Co. 160 Ind. 338, 66 N. E. 895, 61 L.R.A. 154, 98 Am. St. Rep. 325; D. H. Davis Coal Co. v. Poland, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319.

Iowa.—Hunter v. Colfax Consol. Coal Co. 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L.R.A.1917D, 15, Ann. Cas. 1917E, 803.

Kentucky.—Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789.

Louisiana. — State v. Legendre, 138 La. 154, 70 So. 70, L.R.A.1916B, 1270.

Maryland.—Palmore v. Baltimore & O. R. Co. 156 Md. 4, 142 A. 495, citing R. C. L.; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864.

Massachusetts.—Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1.

Minnesota. — Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542.

Mississippi.—United States Fidelity & G. Co. v. Parsons, 147 Miss. 335, 112 So. 469, 53 A.L.R. 88; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A. (N.S.) 851.

Missouri.—Stegmann v. Weeke, 279 Mo. 140, 214 S. W. 137, 5 A.L.R. 1060; Heller v. Jantz, 254 Mo. 704, 164 S. W. 123, L.R.A. 1915B, 191; Shoheney v. Quincy, O. & K. C. R. Co. 221 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143, writ of error dismissed in 223 U. S. 705, 56 L. ed. 621, 32 S. Ct. 517.

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safety, morals, and welfare of those subject to its jurisdiction.[13] If a contract is one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment.[14] The state may also safeguard the public by demanding certain

Montana.—State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

Nebraska.—Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L.R.A. 825.

New Jersey.—Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594.

New York.—People ex rel. Durham Realty Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601, 16 A.L.R. 152, writ of error dismissed in 257 U. S. 665, 66 L. ed. 424, 42 S. Ct. 47; Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809, L.R.A.1917E, 549, Ann. Cas. 1917B, 273; Purdy v. Erie R. Co. 162 N. Y. 42, 56 N. E. 508, 48 L.R.A. 669, rehearing denied in 162 N. Y. 663, 57 N. E. 1122, writ of error dismissed in 185 U. S. 148, 46 L. ed. 847, 22 S. Ct. 605.

North Carolina.—State v. Herring, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep. 461.

North Dakota.—Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Bratberg v. Advance-Rumely Thresher Co. 61 N. D. 452, 238 N. W. 552, 78 A.L.R. 1338.

Ohio.—Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926.

Oregon.—Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217.

Rhode Island.—Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

Tennessee.—Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

Texas.—Owosso Carriage & Sleigh Co. v. McIntosh, 107 Tex. 307, 179 S. W. 257, L.R.A. 1916B, 970.

Virginia.—Sweat v. Com. 152 Va. 1041, 148 S. E. 774, citing R. C. L.

West Virginia.—Marlow v. Ringer, 79 W. Va. 568, 91 S. E. 386, L.R.A.1917D, 619.

Wisconsin.—Watertown Milk Producers Co-op. Asso. v. Van Camp Packing Co. 199 Wis. 379, 225 N. W. 209, 226 N. W. 378, 77 A.L.R. 391.

A statute imposing severe criminal penalties upon a purported cash buyer who, having received delivery of the goods sold, fraudulently fails or refuses to pay according to the terms of the purchase does not violate the right to liberty of contract. People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.

[13] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701 (recognizing rule); Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 S. Ct. 182, Ann. Cas. 1914B, 284; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 S. Ct. 234; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 S. Ct. 164, 31 L.R.A.(N.S.) 7; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 S. Ct. 419; Boone v. State, 170 Ala. 57, 54 So. 109, Ann. Cas. 1912C, 1065; Ex parte Dietrich, 149 Cal. 104, 84 P. 770, 5 L.R.A.(N.S.) 873; Atlantic Coast Line R. Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L.R.A.(N.S.) 20, affirmed in 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. 829; People v. Hartford L. Ins. Co. 252 Ill. 398, 96 N. E. 1049, 37 L.R.A.(N.S.) 778; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1105, 62 L.R.A. 136; State v. Legendre, 138 La. 154, 70 So. 70, L.R.A.1916B, 1270; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Com. v. Boston Transcript Co. 249 Mass. 477, 144 N. E. 400, 35 A.L.R. 1; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290; Minot Special School Dist. v. Olsness, 53 N. D. 683, 208 N. W. 968, 45 A.L.R. 1337; Pittsburgh, C. C. & St. L. R. Co. v. Kinney, 95 Ohio St. 64, 115 N. E. 505, L.R.A.1917D, 641, Ann. Cas. 1918B, 286; Wessell v. Timberlake, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918B, 402; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926; George v. Portland, 114 Or. 418, 235 P. 681, 39 A.L.R. 341; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A. (N.S.) 1015; Sweat v. Com. 152 Va. 1041, 148 S. E. 774, citing R. C. L.; Watertown Milk Producers Co-op. Asso. v. Van Camp Packing Co. 199 Wis. 379, 225 N. W. 209, 226 N. W. 378, 77 A.L.R. 391; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534. See Young v. Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170.

Annotation: 33 L.R.A.(N.S.) 706.

Freedom of contract may be limited where there are visible reasons of public policy for the limitation. Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 159.

The exercise of freedom of contract which conflicts with the power and duty of the state to safeguard its property from injury and to preserve it for those uses for which it was primarily designed may be regulated and limited to the extent which reasonably may be necessary to carry such power and duty of the state into effect. Stephenson v. Binford, 287 U. S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

[14] International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 34 S. Ct. 859, 52 L.R.A.(N.S.) 525; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133 (recognizing rule); Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 S. Ct. 168; Wight v. Baltimore & O. R. Co. 146 Md. 66, 125 A. 881, 37 A.L.R. 864; Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L.R.A.(N.S.) 628; Heller v. Lutz, 254 Mo. 704, 164 S. W. 123, L.R.A.1915B, 191; Sweat v. Com. 152 Va. 1041, 148 S. E. 774, citing R. C. L.

Laws forbidding the intermarriage between members of two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. State v. Gurry, 121 Md. 534, 88 A. 546, 47 L.R.A.(N.S.) 1087, Ann. Cas. 1915B, 957.

[15] Peterson v. Panovitz, 62 N. D. 328, 243 N. W. 798, 84 A.L.R. 1290 (recognizing rule); Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L.R.A. 136; Adinolfi v. Hazlett, 242 Pa. 25, 88 A. 869, 48 L.R.A.(N.S.) 855.

See STATUTE OF FRAUDS [Also 25 R. C. L. p. 434, § 3].

[16] Com. v. Riley, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388, sustaining the constitutionality of a statutory provision that every employer in certain occupations shall post in a conspicuous place in every room where his employees work a notice stating the hours of labor.

[17] Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838.

[18] Annotation: 25 Am. St. Rep. 881.

[19] Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 S. Ct. 5; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

[20] Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

requisites in the execution of some types of contracts. Thus, certain contracts are required to be in writing, manifestly to promote public morals by removing the temptation to perpetrate frauds by perjury.[15] Similarly, it is not an impairment of the freedom of contract to require that certain terms of contract shall be posted in such form as not to be subject to mistake or dispute,[16] or that a copy of a contract shall be delivered to a prospective employee, signed by the employer.[17] Moreover, under the police power the state may prevent the enforcement of contracts which are illegal, immoral, or against public policy, and thus protect infants and persons of unsound mind against engagements to which a more mature or sound mind might not assent.[18]

If the fact situation involved in a contract itself is such that it demands police regulation to preserve the welfare and safety of the state, it makes no difference what person or classes of persons are restricted in their freedom to contract; the restriction actually relates to the contract, rather than to the persons entering into it.[19] Hence, even though no power is reserved to amend corporate charters, the state may validly limit corporate freedom of contract where the welfare of its citizens demands certain action in relation to the matters involved in a contract.[20] The same rule applies to restriction of the freedom of contract of a foreign corporation, if the contract so regulated is of such a nature.[1]

The general rule that in any case governmental power to limit liberty of contract must rest on some reasonable basis and cannot be arbitrarily exercised[2] applies with full force to attempted police regulations which impose restrictions upon such freedom.[3] Hence, a statute limiting the right of a citizen to contract with reference to his property must tend to promote the public good in some way, otherwise it is an unwarranted interference therewith.[4] The fact that unscrupulous men may enter into fraudulent contracts

[1] Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 S. Ct. 5.

[2] See supra, § 341.

[3] Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A.L.R. 163; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, 34 S. Ct. 681, L.R.A.1915D, 677, Ann. Cas. 1915D, 420; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A. 1918F, 542; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Public Serv. Commission v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1, 109 A.L.R. 534. See also State ex rel. Hartigar v. Sperry & H. Co. 94 Neb. 785, 144 N. W 795, 49 L.R.A.(N.S.) 1123.

[4] Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 71 L. ed. 893, 47 S. Ct. 506, 52 A.L.R. 163; Minnesota Iron Co. v. Klene, 199 U. S. 593, 50 L. ed. 322, 26 S. Ct. 150; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L.R.A. 79, 46 Am. St. Rep. 315; Celina & M. County Teleph. Co. v. Union-Center Mut. Teleph. Asso. 102 Ohio St. 487, 133 N. E. 540, 21 A.L.R. 1145; Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109, 58 L.R.A. 654; State v. Holden, 14 Utah, 71, 46 P. 756, 37 L.R.A. 103, affirmed in 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Sweat v. Com. 152 Va. 1041, 148 S. E. 774, citing R. C. L.; Dennis v. Moses, 18 Wash. 537, 52 P. 333, 40 L.R.A. 302.

respecting a lawful business is not alone a sufficient ground for the legislature to prohibit lawful contracts respecting that business.[5]

The courts must determine whether the legislative discretion to control the right of private contract has been exercised in such manner as to interfere unduly with the constitutional right of contract.[6] As in other instances of court inspection of police regulation, no hard and fast rule can be laid down.[7] Each instance must be determined by itself; there is no precise and universal formula for determining the validity of a regulation imposing conditions upon such liberty.[8] Moreover, it may not always be easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint.[9] It has been said, however, that a too precise reasoning should not be exercised to avoid legislative limitation upon the freedom of contract, and that before the Federal Supreme Court may interfere there must be a clear abuse of legislative power.[10]

§ 343. Power over Contracts Involving Extraterritorial Elements.—The ancient doctrine of conflict of laws was that the enforcement of foreign rights was a mere matter of comity and that therefore a state which became the forum might intrude its public policy upon the foreign rights sought to be there enforced in such a way as to alter materially the factors which went to make up the substantive rights and liabilities of the parties. Under this doctrine the statutes of the forum could legally impose conditions upon foreign rights there sued upon, which conditions materially altered such rights. The due process clause of the Fourteenth Amendment, however, has very greatly restricted the power of a state to impose conditions substantially affecting foreign rights sought to be enforced within its borders, if jurisdiction is assumed by the courts of a state of an action involving the enforcement of such rights.[11] This constitutional limitation upon the power of a state to impose local restrictions or changes upon foreign rights has had its most frequent application in relation to such state legislation as would otherwise affect rights acquired in contracts, which contracts embrace altogether or substantially only matters beyond the jurisdiction of the state.[12]

Supreme Court decisions have now established the rule that because of the due process clause a state statute cannot modify the substantive rights involved in a contract the operation of which is extraterritorial or substantially so as far as the state is concerned.[13] A state cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction and lawful where made.[14] Thus, the constitutional liberty of contract is violated by a statute through which a state seeks to extend its authority into another state and forbid parties who are residents of other states from making an agree-

[5] State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512.

[6] Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301.

[7] See supra, §§ 305, 306.

[8] Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 S. Ct. 761, 51 L.R.A.(N.S.) 1097; Steele, H. & M. Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L.R.A.1916C, 1023, Ann. Cas. 1917C, 926.

[9] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 S. Ct. 289.

[10] Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 S. Ct. 74, Ann. Cas. 1913B, 529.

[11] See CONFLICT OF LAWS, supra, p. 304, § 7.

[12] Annotation: 92 A.L.R. 932 et seq.

[13] Annotation: 92 A.L.R. 934 et seq.; 74 A.L.R. 718, s. 100 A.L.R. 1152.

[14] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772.

ment in such other state simply because such an agreement modifies a contract originally made in the state enacting such a statute.[15] A state may not prohibit one of its citizens from making contracts outside its limits and jurisdiction where they are to be performed outside the state.[16] Thus, a state violates the constitutional guaranty of liberty of contract if it attempts to take away the right of its citizens to enter into contracts beyond its borders because such contracts—as, for example, in the case of insurance—happen to relate to property located within the state.[17] Moreover, it may not prohibit one of its citizens from doing an act which is merely the performance of a condition rendered necessary by the provisions of such a contract affecting property which is located within its borders.[18] Furthermore, it may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.[19] Because a citizen may make a contract for himself, however, beyond the confines of his state, it does not follow that he may authorize an agent to violate the laws of his state in his behalf within its own limits.[20]

The general rule has been applied to cases in which a contract is completely extraterritorial. The Supreme Court has held that a statute of a state which purports to create rights and obligations in reference to an entirely foreign

[15] New York L. Ins. Co. v. Head, 234 U. S. 166, 58 L. ed. 1266, 34 S. Ct. 883; New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879.

Annotation: 1 A.L.R. 1669, s. 32 A.L.R. 637; 92 A.L.R. 935.

[16] St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663; Swing v. Brister, 87 Miss. 516, 40 So. 146, 6 Ann. Cas. 740; Stone v. Penn Yan, K. P. & B. R. Co. 197 N. Y. 279, 90 N. E. 843, 134 Am. St. Rep. 879 (recognizing rule); State v. International Paper Co. 96 Vt. 506, 120 A. 900, 32 A.L.R. 632.

Annotation: 1 A.L.R. 1666, s. 32 A.L.R. 636.

A state may not, consistently with the due process clause, penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[17] New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 593; New York L. Ins. Co. v. Head, 234 U. S. 166, 58 L. ed. 1266, 34 S. Ct. 883 (recognizing rule); New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879 (recognizing rule); Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663.

Annotation: 1 A.L.R. 1669, s. 32 A.L.R. 637; 92 A.L.R. 935.

The right of a citizen of a state to conclude with a foreign life insurance company at its home office a policy loan agreement whereby the policy on his life was pledged as collateral security for a cash loan to become due and payable upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness, is within the protection of U. S. Const., Fourteenth Amendment, guaranteeing freedom to contract, and may not be destroyed by state legislation. New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 S. Ct. 337, Ann. Cas. 1918E, 593.

[18] St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663; Swing v. Brister, 87 Miss. 516, 40 So. 146, 6 Ann. Cas. 740; Stone v. Penn Yan, K. P. & B. R. Co. 197 N. Y. 279, 90 N. E. 843, 134 Am. St. Rep. 879 (recognizing rule); State v. International Paper Co. 96 Vt. 506, 120 A. 900, 32 A.L.R. 632.

Annotation: 1 A.L.R. 1666, s. 32 A.L.R. 636.

The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the "liberty" of the citizen which is protected against deprivation without due process of law. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 S. Ct. 427.

[19] Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701; Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[20] Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207.

Annotation: 1 A.L.R. 1670.

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contract violates the due process clause;[1] hence, it may not validly affect rights and obligations arising from contracts which are not made or to be performed in the state.[2] The rule has also been applied to cases in which a contract is substantially extraterritorial. A state may not, on grounds of policy, ignore a right which has lawfully vested elsewhere under a contract if the interest of the forum has but slight connection with the substance of the contract obligation.[3] A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of a contract, conflicts with the guaranties of the Fourteenth Amendment.[4]

The place where the contract is made is of the utmost significance in determining the application of the general rule, for where the contract is entered into within a state, its terms, obligations, and sanctions are subject, in some measure, to the legislative control of such state.[5] The fact that such a contract is to be performed elsewhere does not put such terms, obligations, and sanctions beyond the reach of the power which a state may constitutionally exercise.[6]

A court of the forum, when entertaining jurisdiction of actions on a foreign contract, cannot refuse, on the ground of its own public policy or local statute, to give effect to provisions of the contract valid by its proper law or to other rights or obligations available under that law.[7] Hence, if a contract made and to be performed outside of a state provides that an action must be brought thereon within a year, a statute of the forum declaring invalid any contractual limitation of the right to sue to a shorter period than two years violates the due process clause if attempted to be applied to such a contract so as to permit suit thereon after expiration of the time period stipulated in the contract for bringing suit.[8] Similarly, a state may not apply to an employees' fidelity insurance contract entered into in another state its own statute annulling any contractual limitation of the time for giving notice of claim, although the default occurred after the removal of the insured and his defaulting employee to the state in which the action is brought.[9]

b. Employment Contracts

§ 344. Generally.—It is a general rule that liberty of contract to work and to employ is protected by the Constitutions.[10] A law depriving the laborer

[1] Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701.

[2] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518; Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. ed. 926, 50 S. Ct. 338, 74 A.L.R. 701; Hyatt v. Blackwell Lumber Co. 31 Idaho, 452, 173 P. 1083, 1 A.L.R. 1663.

[3] Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772.

[4] Ibid.

[5] Alaska Packers Asso. v. Industrial Acci. Commission, 294 U. S. 532, 79 L. ed. 1044, 55 S. Ct. 518.

[6] Ibid.

[7] Annotation: 92 A.L.R. 934 et seq.

[8] Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. ed. 926, 74 A.L.R. 701.

[9] Hartford Acci. & Indem. Co. v. Delta & Pine Land Co. 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634, 92 A.L.R. 928, rehearing denied in 292 U. S. 607, 78 L. ed. 1468, 54 S. Ct. 772.

[10] Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27 (recognizing rule);

and employer of the right to contract with one another violates the Fourteenth Amendment.[11] The principle is fundamental and vital. Included in the right of personal liberty and the right of private property and partaking of the nature of each is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right is struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.[12] Therefore, there can be no constitutional interference by the state in the private relationship of master and servant, except for the purpose of preventing frauds and trespass[13] or except in such cases as warrant regulation under the police power.[14] The

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610; Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N. E. 761, 139 N. E. 142, 26 A.L.R. 1392; Topeka Laundry Co. v. Court of Industrial Relations, 119 Kan. 12, 237 P. 1041, 47 A.L.R. 208; Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805; Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863, 63 A.L.R. 188; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Northwestern Nat. Ins. Co. v. Fishback, 130 Wash. 490, 228 P. 516, 36 A.L.R. 1507.

A statute forbidding a contract between master and servant that tips received by the servant shall belong to the master is unconstitutional, as depriving the parties of due process of law. Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301. Annotation: 3 A.L.R. 310.

A statute providing that any contract of employment shall be void whereby the employee is required to purchase capital stock in the business is invalid as impairing the constitutional right to enjoy liberty, to acquire, possess, and defend property, and to seek and obtain safety and happiness. Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838. Annotation: 63 A.L.R. 841.

[11] Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; State v. Legendre, 138 La. 154, 70 So. 70, L.R.A. 1916B, 1270; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; State v. Muller, 48 Or. 252, 85 P. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A. (N.S.) 603, 14 Ann. Cas. 616; State v. Cadigan, 73 Vt. 245, 50 A. 1079, 57 L.R.A. 666, 87 Am. St. Rep. 714.

[12] Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U. S. 552, 69 L. ed. 785, 45 S. Ct. 441; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, 24 A.L.R. 1238, overruled on other grounds in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960 (leading case); Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Ex parte Irish, 121 Kan. 72, 122 Kan. 33, 250 P. 1056, 1057, 61 A.L.R. 332; Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119; State v. Gateway Mortuaries, 87 Mont. 225, 287 P. 156, 68 A.L.R. 1512; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590. See also Morehead v. New York, 298 U. S. 587, 80 L. ed. 1347, 56 S. Ct. 918, 103 A.L.R. 1445, rehearing denied in 299 U. S. 619, 81 L. ed. 456, 57 S. Ct. 4; Opinion of Justices, 267 Mass. 607, 166 N. E. 401, 63 A.L.R. 838; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450.

It is not within the power of the legislature to prescribe by mandatory laws the terms and provisions which shall be inserted in contracts that may be made between persons legally competent to contract. Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 65 N. E. 885, 59 L.R.A. 775, 93 Am. St. Rep. 670.

[13] State v. Haun, 61 Kan. 146, 59 P. 340, 47 L.R.A. 369; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A. (N.S.) 603, 14 Ann. Cas. 616.

[14] See infra, § 345.

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liberty of contract in reference to labor is one which extends to both parties to such contracts,[15] since it includes both the right to sell and the right to purchase labor.[16]

Most of the cases which have extensively considered the nature of the contract right in matters of employment have dealt with it from the standpoint of the employee. It has repeatedly been held that the right of the laborer to enter into contracts for his services is property within the meaning of the constitutional guaranties;[17] that the constitutional right of every man lawfully to acquire property includes the right of making contracts for personal services as a means of acquiring property; and that each person is entitled to make such contracts in reference to such lawful business or occupation as he may choose, free from hindrance or obstruction by his fellow men, except for the protection of equal or superior rights on their part.[18] Moreover, the right to dispose of the compensation received under contracts of labor is, under ordinary circumstances, a property right within the constitutional guaranties.[19] Such right of disposal, however, does not prevent the operation of ordinary methods of procedure in litigation in which proceeds of employment contracts happen to become involved. A statute permitting execution against wages of an employee does not violate the liberty of contract of employer or employee. Such a statute in no wise prevents them from making such a contract as they choose, but merely subjects the proceeds of the contract that become due the employee to the payment of a judgment against him. This is not an interference with the right of contract within the meaning of the due process clause.[20] The constitutional right to liberty also embraces

15 Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Superior Laundry Co. v. Rose, 193 Ind. 138, 137 N. E. 761, 139 N. E. 142, 26 A.L.R. 1392; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450.

An attempt by a state to create continuity of such businesses as food and clothing production and mining, by requiring employers to pay wages fixed by an industrial court and forbidding the employees to strike, violates the provision of the Fourteenth Amendment to the Federal Constitution forbidding deprivation of liberty and property without due process of law. Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103, 43 S. Ct. 630, 27 A.L.R. 1280.

16 Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A.L.R. 230; Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A. 1917B, 1119; Hall v. State, 100 Neb. 84, 158 N. W. 362, L.R.A.1916F, 136; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Cooks,' Waiters' & W. Local Union v. Papageorge (Tex. Civ. App.) 230 S. W. 1086, citing R. C. L.

17 Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A. (N.S.) 603, 14 Ann. Cas. 616; Re Broad, 36 Wash. 449, 78 P. 1004, 70 L.R.A. 1011, 2 Ann. Cas. 212; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L.R.A. 621, 25 Am. St. Rep. 863.

The legislature cannot, under a Constitution protecting property rights and guaranteeing equal protection of the laws, declare that in disputes between employer and employee or between different employees, the right to enter into labor contracts shall no longer be a property right. Bongi v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831.

18 Connors v. Connolly, 86 Conn. 641, 86 A. 600, 45 L.R.A.(N.S.) 564; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Brennan v. United Hatters, 73 N. J. L. 729, 65 A. 165, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

19 Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; State Street Furniture Co. v. Armour & Co. 345 Ill. 160, 177 N. E. 702, 76 A.L.R. 1298; Massie v. Cessna, 239 Ill. 352, 88 N. E. 152, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234. Annotation: Ann. Cas. 1912D, 394.

20 Endicott-Johnson Corp. v. Smith, 266 U. S. 291, 69 L. ed. 293, 45 S. Ct. 63; Endi-

the right to contract regarding employment.[1] The right of a workman freely to use his hands and to use them for whom he pleases, upon such terms as he may choose, is an absolute right, of which he cannot be deprived.[2]

In those cases which have considered employment contracts from the standpoint of the employer, the courts have held that it is clear that the right of an employer to employ labor is necessarily included in the constitutional guaranty of the right to property.[3] The employer may, generally speaking, enter into labor contracts with such individuals as he chooses. Thus, the refusal of the board of directors of a school district empowered to employ teachers to engage a certain person, for any reason or no reason at all, is in no sense a denial of the constitutional right, guaranteed by the due process of law provision, of that person to follow his chosen profession.[4]

The right of a corporation to enter into the relationship of employment with individuals is not a natural fundamental right, and the state may qualify corporate privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact.[5]

§ 345. Police Regulation.—It is a general rule, settled by many decisions upholding statutes prescribing regulations of all kinds pertaining to employment contracts, that the right of contract between employer and employee is a legitimate subject for the exercise of the police power of a state, when the public safety, health, peace, morals, or general welfare demands it.[6]

cott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285, 69 L. ed. 288, 45 S. Ct. 61.

1 State v. Henry, 37 N. M. 536, 25 P. (2d) 204, 90 A.L.R. 805.

2 Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927, 99 Am. St. Rep. 240; Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L.R.A.1916F, 831; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Purvis v. Local No. 500, U. B. C. 214 Pa. 348, 63 A. 535, 12 L.R.A.(N.S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Cooks.' Waiters' & W. Local Union v. Papageorge (Tex. Civ. App.) 230 S. W. 1086, citing R. C. L.

3 Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 25 S. W. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L.R.A. 340, 37 Am. St. Rep. 206; State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; Re Broad, 36 Wash. 449, 78 P. 1004, 70 L.R.A. 1011, 2 Ann. Cas. 212.

A property owner has a legal right to employ any person free to accept employment from him at a wage and under conditions agreeable to him, to construct a building on his property. Carlson v. Carpenter Contractors' Assc. 305 Ill. 331, 137 N. E. 222, 27 A.L.R. 625.

4 Seattle High School Chapter v. Sharples, 159 Wash. 424, 293 P. 994, 72 A.L.R. 1215.

5 Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27.

6 West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Radice v. New York, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325; Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 66 L. ed. 1056, 42 S. Ct. 524; Prudential Ins. Co. v. Cheek, 259 U. S. 530, 66 L. ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27; Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; Bunting v. Oregon, 243 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A.1917D, 1; Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 S. Ct. 345; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, 35 S. Ct. 342, L.R.A.1915F, 829; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 59 L. ed. 607, 35 S. Ct. 359; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 S. Ct. 856; Riley v. Massachusetts, 232 U. S. 671, 58 L. ed. 788, 34 S. Ct. 469; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, 34 S. Ct. 60, L.R.A.1915A, 1196; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 S. Ct. 259; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 S. Ct. 206; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957; Cantwell v. Missouri, 199 U. S. 602, 50 L. ed. 329, 26 S. Ct. 749; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133 (recognizing rule); Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S. W. 887, 12 A.L.R. 1308; State v. Crowe, 130 Ark. 272, 197 S. W. 4, L.R.A.1918A, 567, Ann. Cas. 1918D, 460; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301; Burcher v. People, 41 Colo. 495, 93 P. 14, 124 Am. St. Rep. 143; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A.(N.S.) 994; Bopp v. Clark, 165 Iowa, 607, 147 N. W. 172, 52 L.R.A.(N.S.) 493, Ann. Cas. 1916E, 417; State v. Barba, 132 La. 768, 61 So. 784, 45 L.R.A.(N.S.) 546, Ann. Cas. 1914D, 1261

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These statutes prescribe various conditions concerning wages, hours, and working conditions.[7] The fact that both parties to a contract involving labor are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself.[8]

In limiting liberty of contract for labor under the police power there is no validity to a distinction between a minimum wage and a maximum of hours.[9] In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received; a restriction as to one is not any greater in essence than that as to the other, and is of the same kind. One is the multiplier and the other the multiplicand.[10] The bargain is equally affected whichever half is regulated.[11]

In any case where it is sought to regulate employment contracts, the act must have a direct relation to the objects of the police power, as a means to an end, and the end itself must be appropriate and legitimate.[12] Any limitations of the right involved rest on some reasonable basis and must not be arbitrary.[13]

§ 346. Termination.—Liberty of contract involves, as one of its essential attributes, the right to terminate contracts, subject only to civil liability for unwarranted termination.[14] In this respect the rights of the employer and

(recognizing rule); Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L.R.A.(N.S.) 628; State v. J. J. Newman Lumber Co. 102 Miss. 802, 59 So. 923, 45 L.R.A.(N.S.) 851; State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119; Cameron v. International Alliance, T. S. E. 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594; Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 A. 551, 92 A.L.R. 1450; People v. Charles Schweinler Press, 214 N. Y. 395, 108 N. E. 639, L.R.A.1918A, 1124, Ann. Cas. 1916D, 1059, writ of error dismissed in 242 U. S. 618, 61 L. ed. 530, 37 S. Ct. 214; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788, writ of error dismissed in (U. S.) 41 L. ed. 1181, 17 S. Ct. 993; Starnes v. Albion Mfg. Co. 147 N. C. 556, 61 S. E. 525, 17 L.R.A.(N.S.) 602, 15 Ann. Cas. 470; State v. Bunting, 71 Or. 259, 139 P. 731, L.R.A.1917C, 1162, Ann. Cas. 1916C, 1003, affirmed in 234 U. S. 426, 61 L. ed. 830, 37 S. Ct. 435; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944, Ann. Cas. 1916A, 217, affirmed in 243 U. S. 629, 61 L. ed. 937, 37 S. Ct. 475; Lenahan v. Pittston Coal Min. Co. 218 Pa. 311, 67 A. 642, 12 L.R.A.(N.S.) 461, 120 Am. St. Rep. 885; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682; Jordon v. State, 51 Tex. Crim. Rep. 531, 103 S. W. 633, 11 L.R.A.(N.S.) 603, 14 Ann. Cas. 616.

[7] For discussion of all questions relating to the constitutionality of laws regulating or prohibiting child labor, or of laws limiting hours of labor or providing for minimum wages in private employment in varied occupations for men, women, and children, see LABOR [Also 16 R. C. L. p. 477, § 54; p. 482, §§ 57 et seq.; p. 497, §§ 68 et seq.].

As to the validity of statutes giving a lien or preferring claims of employees for wages in case of insolvency of employer, see INSOLVENCY.

As to the constitutionality of statutes fixing the time for the payment of wages, see MASTER AND SERVANT.

[8] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383; Workmen's Comp. Bd. v. Abbott, 212 Ky. 123, 278 S. W. 533, 47 A.L.R. 789; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 53 S. W. 955, 56 L.R.A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 S. Ct. 1.

[9] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.

[10] Ibid.

[11] Ibid.

[12] Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133; Williams v. Evans, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L.R.A.1918F, 542; State v. Miksicek, 225 Mo. 561, 125 S. W. 507, 135 Am. St. Rep. 597.

[13] State v. Missouri Tie & Timber Co. 181 Mo. 536, 80 S. W. 933, 65 L.R.A. 588, 103 Am. St. Rep. 614, 2 Ann. Cas. 119.

[14] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, 109 N. E. 643, L.R.A.1916C, 218; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L.R.A.(N.S.) 232, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; Holland v. Spartanburg Herald-Journal Co. 166 S. C. 454, 165 S. E. 203, 84 A.L.R. 1336; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

See also Robison v. Hotel & R. Employees, 35 Idaho, 418, 207 P. 132, 27 A.L.R. 642.

Annotation: 68 A.L.R. 1270; 52 L. ed. 436.

employee are equal.[15] Moreover, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a sine qua non of the inception of the employment or of its continuance if it is terminable at will.[16]

It is settled that, ordinarily speaking, any act of the legislature which undertakes to impose on an employer the obligation of keeping one in his service whom, for any reason, he does not desire is a denial of his constitutional right to make and terminate contracts and to acquire and hold property.[17] Ordinarily, therefore, the legislature cannot prohibit an employer from insisting that employees shall withdraw from or refrain from joining a labor union as a condition of employment or of continuing in employment.[18] The same principle has been invoked to declare unconstitutional provisions in a statute for the protection of theater patrons, where such provisions fix the wages of an employee whom the theater is compelled to employ for fire protection, forbid his discharge without approval of the fire commissioners, and forbid

Constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960.

[15] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.

[16] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301.

[17] Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.

[18] Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764; People v. Western U. Teleg. Co. 70 Colo. 90, 198 P. 146, 15 A.L.R. 326; Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L.R.A. 283, 80 Am. St. Rep. 176; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L.R.A. 257, 50 Am. St. Rep. 443; People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, 7 L.R.A.(N.S.) 232, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098, 58 L.R.A. 748, 91 Am. St. Rep. 934.

Annotation: 68 A.L.R. 1270.

In Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764, the court declared unconstitutional an act of Congress providing "that any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization" shall be guilty of a misdemeanor.

In Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, 35 S. Ct. 240, L.R.A.1915C, 960, a state statute providing that it shall be unlawful for any individual or member of any firm, etc., to coerce, require, demand, or influence any person to enter into any agreement, either written or verbal, not to join or to become or remain a member of any labor organization or association, as a condition of such person securing or continuing in employment, and that any violation of such provision shall be a misdemeanor, was held to violate the provisions of the Fourteenth Amendment.

A statute declaring provisions in contracts of employment whereby either party undertakes not to join, become, or remain a member of a labor union or any organization of employers, or undertakes in such event to withdraw from the contract of employment, to be against public policy and void is repugnant to the constitutional guaranties of liberty and property. Opinion of Justices, 271 Mass. 598, 171 N. E. 234, 68 A.L.R. 1265.

any reduction in his salary.[19] Also unconstitutional is an act forbidding a railroad company to discharge an employee upon information touching his conduct without an opportunity to be heard in the presence of the one furnishing the information.[20]

A statute which does not interfere with the right of an employer to select or discharge employees, but provides fully against interfering with the right of employees to have representatives of their own choosing for bargaining with the employers to promote agreements relating to rates of pay and conditions of work does not violate the Fifth Amendment.[1] Thus, a railway employer's liberty of contract is not impaired by legislation and a decree which directs said employer to treat with a bargaining agent of the employees and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes whether arising out of the application of such agreements or otherwise. Such a statute and decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. No contract of employment or termination of contracts with individuals is unconstitutionally infringed thereby.[2]

Under the National Labor Relations Act the power of an employer, whose operations fall within the purview of the act, to discharge employees for any reason he pleases is somewhat modified. The Supreme Court has held that Congress may, as an incident to the regulation of labor relations affecting interstate commerce, provide for the reinstatement of employees found to have been discharged because of their union activity and for the purpose of discouraging membership in a union.[3] The court stated that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation, there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.[4] The National Labor Relations Act does not, however, interfere with the normal exercise of the right of an employer to select his employees or to discharge them, so long as he does not under cover of that right intimidate or coerce his employees with respect to their self-organization and representation.[5]

The liberty to terminate employment contracts is fully protected as far as the employee is concerned.[6] An act which requires one to remain in the service of another whom he does not desire to serve is invalid,[7] because an

19 O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590.

20 Opinion of Justices, 220 Mass. 627, 108 N. E. 807, L.R.A.1917B, 1119.
Annotation: 66 L. ed. 1045; L.R.A.1917B, 1122.

1 National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352; Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592 (Railway Labor Act of 1926 as amended by Act of 1934); Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427 (Railway Labor Act of 1926).

2 Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592.

3 National Labor Relations Bd. v. Jones & L. Steel Corp. 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615, 108 A.L.R. 1352.

4 Ibid.

5 Ibid.

6 Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.

7 Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936; O'Neil v. Providence Amusement Co. 42 R. I. 479, 108 A. 887, 8 A.L.R. 1590; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.

employee cannot constitutionally be compelled to work against his will for any employer and is at liberty to refuse to continue to serve him.[8] Accordingly, it has been held that a statute making it a misdemeanor for one under contract to labor or work on particular land to break his contract and enter into another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the court, and without giving notice of his contract to the person with whom he makes the new one, violates the constitutional guaranties of liberty.[9] Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, is necessarily subject to limitation when employment is accepted in a business which is charged with a public interest and as to which the power to regulate commerce possessed by Congress applies and the resulting right to fix a standard of wages necessarily obtains in case of disagreement and dispute.[10]

X. BILLS OF ATTAINDER, EX POST FACTO AND RETROSPECTIVE LAWS

A. Bills of Attainder

§ 347. Generally.—The Federal Constitution contains a prohibition against the enactment of bills of attainder by Congress[11] and also by the states.[12] When the Constitution was adopted, bills of attainder and bills of pains and penalties were well known in the English law and these terms had a clear and well-defined meaning. Bills of attainder were acts of Parliament whereby sentence of death was pronounced against the accused. Bills of pains and penalties were acts pronouncing milder punishments. "Bills of attainder" as used in the Federal Constitution include bills of attainder proper as well as bills for pains and penalties.[13] The prohibition against bills of attainder prevents a bill which may either affect the life of an individual or confiscate his property or do both.[14] In the case of either bills of attainder or bills of pains and penalties the legislative body, in addition to its legitimate functions, exercises the powers and office of judge, pronounces upon the guilt of the party, without any forms and safeguards of trial, determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise, and fixes the degree of punishment in accordance with its own notions of the enormity of the offense.[15] Such bills are generally directed against individuals by name, but they can be directed against a whole class. They can inflict punishment absolutely or conditionally, and can even provide that if the person affected surrenders himself before a certain day for trial, the penalties and disabilities declared shall be void and of no effect.[16] These

8 Arthur v. Oakes (C. C. A. 7th) 63 F. 310, 25 L.R.A. 414; Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 66 L.R.A. 185, 1 Ann. Cas. 936.

9 Toney v. State, 141 Ala. 120, 37 So. 332, 67 L.R.A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Shaw v. Fisher, 113 S. C. 287, 102 S. E. 325, citing R. C. L.

10 Wilson v. New, 243 U. S. 332, 61 L. ed. 755, 37 S. Ct. 298, L.R.A.1917E, 938, Ann. Cas. 1918A, 1024.

11 U. S. Const. Art. 1, § 9.

12 U. S. Const. Art. 1, § 10.

13 Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

14 Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

15 Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; House & Lot v. State, 204 Ala. 108, 85 So. 382, 10 A.L.R. 1589; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572.

16 Cummings v. Missouri, 4 Wall. (U. S.)

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provisions of the Federal Constitution have been invoked in testing the validity of state laws and Constitutions.[17] Thus, a state law should not be considered as being in the nature of a bill of attainder where it requires a conviction in the due course of judicial proceedings, before a designated statutory penalty shall attach.[18] The provision of a state Constitution disfranchising all persons who have voluntarily borne arms against the government of the United States or aided or abetted an attempted overthrow of the government, unless the disability has been removed by service and honorable discharge in the Army, or by the legislature, has been upheld as not amounting to a bill of attainder.[19]

In some of the bills of rights there are provisions to the effect that no conviction for crime should work corruption of blood or forfeiture of estate. The power of the legislature to provide for the forfeiture of specified articles where their use is contrary to law is not limited by such provisions. The general forfeiture referred to in such measures is of a man's estate for crime.[20] Thus, the constitutional provision against forfeiture of estate has no application to proceedings to forfeit property to abate a nuisance, such as the manufacture of intoxicating liquors.[1]

B. Ex Post Facto Laws

1. Definition and Nature

§ 348. Definition.—The Constitution of the United States contains a prohibition against the enactment of ex post facto laws by Congress[2] and also by the legislature of any individual state.[3]

The Supreme Court of the United States at different times has enunciated somewhat variant definitions of the phrase "ex post facto laws." The early and classic definition is as follows: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."[4] An ex post facto law has also been defined as a law which punishes that which was innocent when done, which adds to the punishment of that which was criminal, which increases the malignity of a crime, or which narrows the rules of evidence, so as to make conviction more easy.[5] Again it is said that a law, to be ex post facto, must be one that deprives the person accused of crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense.[6]

277, 18 L. ed. 356; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

17 See infra, § 352.

18 Washington v. State, 75 Ala. 582, 51 Am. Rep. 479.

19 Boyd v. Mills, 53 Kan. 594, 37 P. 16, 25 L.R.A. 486, 42 Am. St. Rep. 306.

20 House & Lot v. State, 204 Ala. 108, 85 So. 382, 10 A.L.R. 1589; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L.R.A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 335.

1 House & Lot v. State, 204 Ala. 108, 85 So. 382, 10 A.L.R. 1589.
Annotation: 10 A.L.R. 1591.
See Intoxicating Liquors [Also 15 R. C. L. p. 406, § 174].

2 U. S. Const. Art. 1, § 9.

3 U. S. Const. Art. 1, § 10.

4 Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648.
Annotation: 37 Am. St. Rep. 583.

5 Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322. See also Woart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384, to the effect that an ex post facto law is one establishing a new rule for the punishment of an act already done.

6 Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96; Murphy v. Com.

The classic definition above given has been quoted, referred to, and followed in many cases.[7] Doubts have been entertained, however, by some of the courts and authorities as to whether the fourth class does not include cases outside the prohibition and whether every law that alters the legal rules of evidence and receives different testimony from that which the law required at the time of the commission of the offense, in order to convict the offender, is an ex post facto law.[8] The early definition, as set up by the Supreme Court, has been modified to some extent by the later decisions which define an ex post facto law as one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.[9] This definition, moreover, has

172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

7 Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507, affirming 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730, 15 Ann. Cas. 241; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 904; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; Re Tyson, 13 Colo. 482, 22 P. 810, 6 L.R.A. 472, overruled in Kelly v. People, 17 Colo. 130, 29 P. 805; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717; State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; State v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1113; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706; People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572; Ex parte Larkin, 1 Okla. 53, 25 P. 745, 11 L.R.A. 418; State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053, affirmed in 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507; Culbertson v. Com. 137 Va. 752, 119 S. E. 87, citing R. C. L.; State v. Lopeman, 143 Wash. 99, 254 P. 454, citing R. C. L.; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. 805, 32 L.R.A. 380; People v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834; Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.
Annotation: 33 L. ed. 835; 31 Am. St. Rep. 104; 37 Am. St. Rep. 583; 60 Am. Dec. 726.

A statute which deprives a man of his estate or any part of it for a crime which was not declared to be an offense by any previous law is void as an ex post facto law. Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

Every law that alters legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender is ex post facto. Culbertson v. Com. 137 Va. 752, 119 S. E. 87, citing R. C. L.

8 Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558.
Annotation: 37 Am. St. Rep. 583.
See infra, § 359.

9 Lindsey v. Washington, 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797; Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507, affirming 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053; Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. Ct. 922; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Cook v. United States, 138 U. S. 157, 34 L. ed. 906, 11 S. Ct. 268; Re Savage, 134 U. S. 178, 33 L. ed. 842, 10 S. Ct. 389; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96; Higginbotham v. State, 88 Fla. 26, 101 So. 233, citing R. C. L.; Cassard v. Tracy, 52 La. Ann. 835, 27 So. 368, 49 L.R.A. 272; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266; Lindsey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; State v. McCoy, 87 Neb. 385, 127 N. W. 137, 28 L.R.A.(N.S.) 583; State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706; Garnsey v. State, 4 Okla. Crim. Rep. 547, 112 P. 24, 38 L.R.A.(N.S.) 600; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728; People v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834; Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.
Annotation: 33 L. ed. 835; 45 Am. Rep. 541.

Any statute which punishes as a crime an act innocent when previously committed, which makes more burdensome the punishment for a crime after its commission, or which deprives the one charged

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been referred to as one which may be relied on as amounting to a formula comprehending all the definitions of the term.[10] In one instance the Supreme Court of the United States in repeating the definition last above stated omitted the qualifying words "in relation to the crime and its consequences" and appears to affirm that an ex post facto law is one which alters the situation of the accused to his disadvantage.[11] It seems, however, that this omission was due to inadvertence.[12]

§ 349. Application and Limitation of Rule.—Under the modern rule that a statute enacted subsequently to the commission of the crime falls within the prohibition of ex post facto laws as set forth in the Federal or state Constitutions, if it alters the situation of the accused to his disadvantage,[13] a law repealing another statute, under which a plea of guilty guaranteed the accused immunity from the death sentence on a first degree murder charge, is an ex post facto law in that it operates to the substantial disadvantage of the accused.[14] A law, however, cannot be said to be ex post facto which provides punishment or a penalty for the continued maintenance of certain conditions which, prior to the enactment of the statute, were lawful.[15] Hence, a statute making possession of liquor lawfully acquired unlawful is not ex post facto so far as it affects continued possession in the future.[16] A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts previously committed, as well as to prescribe a rule of conduct for citizens in the future, is void in so far as it is retrospective; but such invalidity will not affect its operation in regard to future cases.[17]

This right of protection against the passage of ex post facto laws guaranteed to citizens by the Constitution has no relation to crimes committed outside the jurisdiction of the United States and against the laws of a foreign country.[18] It is not applicable to laws providing for the deportation of aliens from the United States.[19]

with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68.

Where, at the time the offense was committed, the Constitution of the state made a conviction for murder in the second degree on a plea of guilty, although afterwards set aside, a bar to a prosecution for murder in the first degree, a new Constitution which changes the rule is, as to that offense, an ex post facto law, although regularly in force when the plea is entered and the appeal taken. Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443.

10 People v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

11 Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384.

12 People v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

13 See supra, § 348.

14 Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531.

15 Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1373; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

The penalty feature of a statute compelling railway companies to construct transverse openings in rights of way and roadbeds to take care of surface water is not ex post facto as applied to a railroad already in existence, where such railroad is subjected by that statute to the penalty incurred for noncompliance, not because of the manner in which its railroad embankment was originally constructed, nor for anything else done or omitted before the passage of the amendatory act, but because after that time the embankment was maintained in a manner prohibited by that act. Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678.

16 Samuels v. McCurdy, 267 U. S. 188, 69 L. ed. 568, 45 S. Ct. 264, 37 A.L.R. 1378; Barbour v. Georgia, 249 U. S. 454, 63 L. ed. 704, 39 S. Ct. 316.

Annotation: 37 A.L.R. 1387.

The state may declare unlawful the sale of intoxicating liquors which were in existence and which could have been sold prior to the prohibitory enactment. Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D, 94.

For a detailed discussion of the constitutionality of liquor laws, see INTOXICATING LIQUORS [Also 15 R. C. L. p. 265, § 19].

17 Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 S. Ct. 70.

Annotation: 33 L. ed. 836.

18 Neely v. Henkel, 180 U. S. 109, 45 L. ed. 448, 21 S. Ct. 302.

19 Mahler v. Eby, 264 U. S. 32, 68 L. ed.

§ 350. Application to Judicial Decisions.—According to the natural import of the terms of the Constitution relating to ex post facto laws, the provision is a restraint solely upon the legislative power.[20] The provision is not aimed at the decision of the courts in interpreting statutes which were in effect at the time of the commission of the acts.[1] There is, however, some authority which extends the prohibition of the ex post facto clause to judicial decisions which, through a change of views, make an act a crime which under former decisions was not criminal.[2]

§ 351. Limitation to Criminal and Penal Laws.—The expression "ex post facto laws" is a technical one which was in use long before the Revolution and had acquired an appropriate meaning by legislators, lawyers, and authors.[3] The phrase is one which relates exclusively to criminal or penal statutes.[4]

549, 44 S. Ct. 283; Bugajewitz v. Adams, 228 U. S. 585, 57 L. ed. 978, 33 S. Ct. 607. For a detailed discussion, see ALIENS, Vol. 2, p. 517, § 100.

20 Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; McClain, J., in State v. O'Neil, 147 Iowa, 513, 126 N. W. 454, 33 L.R.A.(N.S.) 788, Ann. Cas. 1912B, 691.

1 Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; Mitchell v. People, 76 Colo. 346, 232 P. 685, 40 A.L.R. 566.

Annotation: Ann. Cas. 1914C, 228.

Judicially construing a state statute as making criminal certain acts done since its enactment over the objection that such a construction violates the prohibition against ex post facto laws presents no Federal question since the prohibition is a restraint upon legislative, not judicial, action. Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224.

Erroneous or inconsistent decisions by the courts are not reached by the prohibition of U. S. Const. Art. 1, § 10, against ex post facto laws, but such provision is directed against legislative action only. Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582.

The departure by the Supreme Court from a decision that an oral confession is circumstantial evidence within the rule forbidding the death penalty on circumstantial evidence is not ex post facto legislation with respect to a crime committed while the former decision was in force. Mitchell v. People, 76 Colo. 346, 232 P. 685, 40 A.L.R. 566.

2 Deemer, Ch. J. and Sherwin, J., concurring in State v. O'Neil, 147 Iowa, 513, 126 N. W. 454, 33 L.R.A.(N.S.) 788, Ann. Cas. 1912B, 691; State v. Longino, 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371.

Annotation: Ann. Cas. 1914C, 228.

In State v. Longino, 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371, it was held that where a criminal statute had been construed by the highest court of the state as not including certain acts, and afterwards that decision was overruled, the change of construction was in the nature of an amendment of the statute which the rule against ex post facto laws would permit to operate only prospectively; and, therefore, a criminal charge could not be based on acts of the kind in question done after the decision in the first case, but before it had been overruled.

In State v. O'Neil, 147 Iowa, 513, 126 N. W. 545, 33 L.R.A.(N.S.) 788, Ann. Cas. 1912B, 691, the statute under which the defendant was prosecuted had been declared unconstitutional before the alleged offense was committed, but thereafter that decision was overruled. Two of the concurring judges took the view that the prosecution could not be maintained, because the overruling decision, by virtue of the constitutional provision against ex post facto laws, could not operate retrospectively.

As to criminal responsibility for violation of a statute after a judicial ruling that it is unconstitutional or inapplicable to a given state of facts and before the ruling has been changed, see CRIMINAL LAW [Also 8 R. C. L. Perm. Supp. 2234].

3 Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; State ex rel. Sherburne v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706.

4 Mahler v. Eby, 264 U. S. 32, 68 L. ed. 549, 44 S. Ct. 283; Bugajewitz v. Adams, 228 U. S. 585, 57 L. ed. 978, 33 S. Ct. 607; Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 S. Ct. 213; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 S. Ct. 482; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Locke v. New Orleans, 4 Wall. (U. S.) 172, 18 L. ed. 334; Carpenter v. Pennsylvania, 17 How. (U. S.) 456, 15 L. ed. 127; Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Hart v. State, 40 Ala. 32, 88 Am.

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A statute providing for the restraint and care of the criminally insane, which was enacted after the commission of the crime, is not ex post facto because such a statute is not a criminal act, but rather one prescribing the treatment of insane persons.[5] In accord with the general rule that disbarment proceedings are not criminal in their nature,[6] a rule of the court providing for substituted service in disbarment proceedings where the attorney resides out of the state, has departed therefrom, or cannot be found therein, as applied to one whose alleged offense was committed before its adoption, is not within a constitutional prohibition of ex post facto laws.[7] A statute providing for injunctions against liquor nuisances, subsequent to the adoption of local option, is not ex post facto in that it imposes an additional burden, because such a statute is not criminal in its nature;[8] and since statutes imposing penalties for evading the payment of taxes are not classed as providing punishment for a crime, they do not fall within this particular constitutional prohibition.[9] It is undoubtedly true that in harmony with this distinction one of the most important classes of ex post facto laws consists of those in which, after an action indifferent in itself has been committed, the legislature then, for the first time, declares it to have been a crime and inflicts a punishment on the person who has committed it.[10] Other classes of statutes also fall within the prohibition, but they all relate to criminal and penal matters.[11]

§ 352. Mandatory Character of Prohibition.—The prohibition against the enactment of ex post facto laws applies not only to the state legislatures, but

Dec. 752; Fairfield v. Huntington, 23 Ariz. 528, 205 P. 814, 22 A.L.R. 1438; Foster v. Police Comrs. 102 Cal. 483, 37 P. 763, 41 Am. St. Rep. 194; French v. Deane, 19 Colo. 504, 36 P. 609, 24 L.R.A. 387; Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A. (N.S.) 680, Ann. Cas. 1913C, 317; State v. Tyree, 70 Kan. 203, 78 P. 525, 3 Ann. Cas. 1020; Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A.(N.S.) 832; Durrett v. Davidson, 122 Ky. 851, 93 S. W. 25, 8 L.R.A. (N.S.) 546; Henderson & N. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973; Cassard v. Tracy, 52 La. Ann. 835, 27 So. 368, 49 L.R.A. 272; State ex rel. Sherburne v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266; Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L.R.A. 880, 95 Am. St. Rep. 517; Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291, overruled on another point in Barry v. Mandell, 10 Johns. (N. Y.) 563; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Fisher v. Astoria, 126 Or. 268, 269 P. 853, 60 A.L.R. 260; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Bender v. Crawford, 33 Tex. 745, 7 Am. Rep. 270; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663; Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.

Annotation: 1 L. ed. 654; 33 L. ed. 835; 1 L.R.A. 632; 37 Am. St. Rep. 584; 69 Am. St. Rep. 469.

Laws which affect only civil rights or which regulate civil remedies are not within a constitutional prohibition of the passage of ex post facto laws. Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973.

The ex post facto laws that are prohibited by express constitutional provision are criminal in nature as distinguished from acts which affect property rights. Fisher v. Astoria, 126 Or. 268, 269 P. 853, 60 A.L.R. 260.

5 Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A.(N.S.) 680, Ann. Cas. 1913C, 317.
For a detailed discussion, see CRIMINAL LAW [Also INSANITY, 14 R. C. L. p. 609, § 61].

6 See ATTORNEYS AT LAW, Vol. 5, p. 434, § 287.

7 Re Craven, 178 La. 372, 151 So. 625, 90 A.L.R. 973.

8 Annotation: 49 A.L.R. 646.

9 Bankers Trust Co. v. Blodgett, 260 U. S. 647, 67 L. ed. 439, 43 S. Ct. 233.
For a detailed discussion, see TAXATION [Also 26 R. C. L. p. 385, § 342].

10 Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Gut v. State, 9 Wall. (U. S.) 35, 19 L. ed. 573; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Foster v. Police Comrs. 102 Cal. 483, 37 P. 763, 41 Am. St. Rep. 194; Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239; State v. Johnson, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291, overruled on another point in Barry v. Mandell, 10 Johns. (N. Y.) 563; State v. Massey, 103 N. C. 356, 9 S. E. 632, 4 L.R.A. 308; Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.

11 See infra, § 355.

also to the people of the states in adopting Constitutions or making changes in their fundamental law.[12] Hence, it is well recognized that the adoption of a new Constitution does not, as to past offenses, have the effect of repealing the old one in violation of the inhibition as to ex post facto laws.[13] The prohibition of the enactment of ex post facto laws by a state is absolute and cannot be evaded by the form of the enactment,[14] and it must be enforced, although the effect in particular cases may be to release from custody and from accountability in the courts persons who have actually committed offenses as heinous even as murder.[15]

§ 353. Mitigation of Rigor of Law.—Every retrospective penal or criminal statute is not necessarily ex post facto. If a statute mitigates the punishment prescribed for an offense, it is not ex post facto, although retrospective. A retrospective criminal or penal law that does not deprive the party of some constitutional right to which he was entitled under the law at the time the offense was committed or does not alter his situation to his disadvantage is not ex post facto.[16] The general rule is that a law is not within the constitutional prohibition where, instead of creating or aggravating the crime, increasing the punishment, or changing the rules of evidence for the purpose of conviction, it mitigates the rigor of the law.[17] Practical difficulties may arise in determining whether a particular statutory change does or does not amount to a mitigation of the rigor of the law. It has been said that this mitigation must consist of the remission of some separable part of the punishment before prescribed and that if one penalty is substituted for another, the courts will not undertake to determine whether the latter is less severe than the former.[18] The principle has been affirmed that a statute which alters or may alter in a substantial manner the positions of those committing offenses prior to its passage is unconstitutional as to such an offense, although in the

12 Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

The constitutional prohibition against ex post facto laws reaches every form in which the legislative power of a state is exerted, whether it is by a Constitution, a constitutional amendment, an enactment of the legislature, a bylaw or ordinance of a municipal corporation, or a regulation or order of some instrumentality of the state exercising delegated legislative authority. Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224.

13 State ex rel. Sherburne v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472.

14 Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; French v. Deane, 19 Colo. 504, 36 P. 609, 24 L.R.A. 387; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

The ex post facto effect of a law cannot be evaded by giving a civil form to that which was essentially criminal. Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104.

The legislature under the guise of laws relating to prison discipline cannot take away any substantial right or privilege which was secured to a party by the law as it was when the offense was committed. Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

15 Re Savage, 134 U. S. 176, 33 L. ed. 842, 10 S. Ct. 389; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384.
Annotation: 45 Am. Rep. 545.

16 Rooney v. North Dakota, 196 U. S. 319, 49 L. ed. 494, 25 S. Ct. 264, 3 Ann. Cas. 76; State v. Tyree, 70 Kan. 203, 78 P. 525, 3 Ann. Cas. 1020; Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L.R.A. 238; McCarty v. State, 1 Wash. 377, 25 P. 299, 22 Am. St. Rep. 152.
Annotation: 3 Ann. Cas. 79.

17 Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507, affirming 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572.
Annotation: 37 Am. St. Rep. 587; 3 Ann. Cas. 80.

18 Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674.
As to what changes have been held to amount to a mitigation of the rigor of penalties, see infra, § 354.

particular case it would operate more beneficially than the prior law would have operated.[19] On the other hand, it is clear that if the change is such as may be regarded in no other light than as a mitigation of punishment, a statute authorizing such change is not ex post facto, although it is made applicable to offenses committed before its enactment.[20]

§ 354. Illustrations as to Mitigation.—The difficulties which may arise in determining the changes in penalties and punishments which may be treated as a mitigation of the rigor of the law, thereby escaping the prohibition as to ex post facto laws, may be shown by illustrative decisions. No real difficulties are presented by the established rule that a statute diminishing the degree of punishment for an offense, but making no alteration in the kind of punishment, is not an ex post facto law and must govern thereafter in imposing punishment for an offense committed prior to its passage.[1] A statute changing the punishment for an offense from whipping, not exceeding 100 stripes, to a fine and confinement in the penitentiary at hard labor for a year and a day is not ex post facto.[2] The same conclusion has been reached in respect of a statute providing for indeterminate sentences falling within the limits of the maximum and minimum period established by the prior law.[3] As another illustration of the extent to which the doctrine is carried may be mentioned a case in which a different conclusion was reached and in which it was held that a law passed after the commission of an offense was ex post facto in that, while it reduced the maximum of imprisonment that might be inflicted, yet it increased the minimum. This slight variance in the law was held to make it ex post facto and void, although the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, although found guilty of the offense.[4] A change is in mitigation of the rigor of the law when by the later law there is an enlargement of the period of confinement prior to the execution of persons convicted of capital offenses. Thus, the giving by a later statute of three months' additional time to live after the rendition of judgment and sentence of death would be clearly to the advantage of the prisoner, since the court would assume that every rational person desires to live as long as possible.[5] Furthermore, a statute which changes the law under which separate and cumulative sentences must be imposed for separate crimes by providing that where the defendant is convicted of a number of crimes on one indictment, the court may order that

[19] Lindsey v. Washington, 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

[20] People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572.
Annotation: 37 Am. St. Rep. 587; 3 Ann. Cas. 78.

[1] People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572; State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L.R.A. 181.
Annotation: 37 Am. St. Rep. 587.

[2] Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322.
Annotation: 37 Am. St. Rep. 587.

[3] Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322. See Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

The duration of a sentence is not uncertain, and the determination of the term of imprisonment is not taken from the courts, so as to make the act ex post facto as applied to an offense previously committed, merely because it provides for a sentence that is indeterminate between a maximum and minimum and gives the prison commissioners, after the minimum term, power to release the prisoner on a permit approved by the governor and council. Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.
See infra, § 356.

[4] Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531.
Annotation: 45 Am. Rep. 541.

[5] Rooney v. North Dakota, 196 U. S. 319, 49 L. ed. 494, 25 S. Ct. 264, 3 Ann. Cas. 76; Alberty v. State, 140 P. 1025, 10 Okla. Crim. Rep. 616, 52 L.R.A.(N.S.) 248.

the sentences shall run concurrently, is not, as applied to offenses committed before its enactment, ex post facto.[6]

2. Changes in Crimes and Penalties

§ 355. Generally.—One class of ex post facto laws consists of statutes which impose a punishment in addition to that prescribed by the existing law[7] or which establish punishment for acts antecedently done that were not punishable when done[8] or were not punishable in the manner prescribed by the subsequent statute.[9] The punishment may be lessened, but never increased, as against anyone, for a crime already committed, and statutes which aggravate the punishment come within the prohibition as to ex post facto laws,[10] although a mere change in conditions surrounding punishment, which is deemed necessary for the orderly infliction of punishment, is not within the ex post facto clause.[11]

§ 356. Applications of General Rule.—A statute passed after the commission of the crime of murder, auding to the existing punishment of death the further punishment of imprisonment in solitary confinement until the execution, falls within the classification of an ex post facto law, with the result that a sentence inflicting both punishments is void.[12] On the other hand, the fact that the confinement is designated as solitary is unimportant where the statute in fact gives the prisoner as many liberties as the former one.[13] A law

[6] People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303.

[7] Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Wilson v. Ohio & M. R. Co. 64 Ill. 542, 16 Am. Rep. 565; People v. Bodjack, 210 Mich. 443, 178 N. W. 228, citing R. C. L.
Annotation: 37 Am. St. Rep. 587; 3 Ann. Cas. 78.
For a detailed discussion of the constitutionality of statutes changing punishment or for the enhancement thereof, see Criminal Law [Also 8 R. C. L. p. 259, § 268].

[8] Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Foster v. Police Comrs. 102 Cal. 483, 37 P. 763, 41 Am. St. Rep. 194.
Annotation: 3 L.R.A. 183.

[9] Lindsey v. Washington, 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356; Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; Ex parte Larkins, 1 Okla. 53, 25 P. 745, 11 L.R.A. 418; Jones v. State, 9 Okla. Crim. Rep. 646, 133 P. 249, 48 L.R.A.(N.S.) 204.

[10] People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303; Jones v. State, 9 Okla. Crim. Rep. 646, 133 P. 249, 48 L.R.A.(N.S.) 204; State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053, affirmed in 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507.
Annotation: 37 Am. St. Rep. 587.
The punishment prescribed by law for an offense at the time it was committed cannot be changed by subsequent legislation, unless the change is advantageous to the prisoner. State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053, affirmed in 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507.

[11] Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507; Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 S. Ct. 143.
The constitutional inhibition of ex post facto laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment. Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507, affirming 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053.
The legislature of a state can legally prescribe that the sentence to death shall be executed before sunrise and within the walls of the jail or within some other inclosure higher than the gallows so as to exclude the view of persons outside, and the number and character of those who may witness the execution, and that newspaper reporters shall be excluded: and such regulations when applied to offenses previously committed are not ex post facto. Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 S. Ct. 143.

[12] McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971, 12 S. Ct. 156; Re Savage, 134 U. S. 176, 33 L. ed. 842, 10 S. Ct. 389; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384.
The new power of fixing any day and hour during a period of a week for the execution, given by an act to the warden of the penitentiary, being a departure from the law as it existed before, and with its secrecy causing increased mental anxiety to the prisoner, amounts to an increase of punishment and renders the law ex post facto and void, so far as it relates to crimes committed before its passage. Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384.

[13] Re Tyson, 13 Colo. 482, 22 P. 810, 6

which shortens the time between the sentence and execution of a person condemned to death is ex post facto and void as to offenses committed previous to its enactment.[14] A change in the place of confinement from an institution where criminals convicted of minor offenses are incarcerated to one established for the imprisonment of those convicted of more henious crimes is an aggravation of the punishment, on account of the disgrace and reproach attached to the confinement with criminals of a more depraved and infamous character.[15] On the other hand, a statute substituting the state penitentiary for the county jail as the place of confinement for persons convicted of murder and awaiting execution is not ex post facto, since there could be no enhancement of ignominy to one already under sentence of death for a heinous crime.[16] A statute which changes the mode of execution from hanging to electrocution is not prohibited by this clause since the latter method is a more humane procedure for the taking of human life.[17] Moreover, a statute which merely regulates the manner in which an execution shall be conducted by prescribing the time and manner of the execution and the number and character of the witnesses is not ex post facto, although it applies to offenses committed before its enactment.[18] As pointed out above, the ex post facto clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed, and an increase in the possible penalty may be a violation of the clause regardless of the length of the sentence actually imposed.[19] Thus, a statute which makes mandatory the imposition of the maximum sentence under an indeterminate sentence law and the fixing of the period of confinement by the parole board is ex post facto where the former statute allowed the court to fix the sentence at not less than the minimum or more than the maximum, terms as prescribed by such law.[20] On the other hand, an indeterminate sentence law which does not add to, or increase the punishment of, an offense beyond that existing at the time of its commission is not ex post facto, although the crime was committed before the passage of the act. A different method of fixing the amount of punishment between certain limits, which merely mitigates the punishment, does not add to or increase it.[1] A statute setting up an indeterminate sentence and repealing

L.R.A. 472, overruled on another point in Kelly v. People, 17 Colo. 130, 29 P. 805.

14 Ibid.

15 Ibid.

16 Ibid.

17 Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507; Alberty v. State, 10 Okla. Crim. Rep. 616, 140 P. 1025, 52 L.R.A.(N.S.) 248; State v. Malloy, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053, affirmed in 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507.

It is commonly known that the adoption of electrocution as the mode for inflicting death in capital cases is the consequence of a well-grounded belief that electrocution is less painful and more humane than hanging. Malloy v. South Carolina, 237 U. S. 180, 59 L. ed. 905, 35 S. Ct. 507.

A change in the punishment for murder from death by hanging within the county jail or its inclosure, in the presence of specified witnesses, to electrocution within the penitentiary, in the presence of an increased number of invited witnesses, does not render the statute invalid as being ex post facto when applied to crimes previously committed. Alberty v. State, 10 Okla. Crim. Rep. 616, 140 P. 1025, 52 L.R.A. (N.S.) 248.

18 Rooney v. North Dakota, 196 U. S. 319, 49 L. ed. 494, 25 S. Ct. 264, 3 Ann. Cas. 76; Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 S. Ct. 143.

Annotation: 3 Ann. Cas. 81.

A statute which prescribes the hour of the day before which, and the manner in which, the punishment by hanging shall be inflicted is not ex post facto as to offenses committed before its passage. Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734, 11 S. Ct. 143.

19 See supra, § 354.

20 Lindsey v. Washington, 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797.

1 Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572.

A statute amended by leaving out the minimum limitation of the term of imprisonment for a crime, so that the punishment may be for a less, but cannot be for a greater, term than before, cannot be regarded as an ex post facto law. People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L.R.A. 830, 37 Am. St. Rep. 572.

another in force at the time of the commission of the crime which provided a scale of credits for good behavior is ex post facto as to a person accused of such crime, and he cannot be punished thereunder.[2] A statute enhancing the punishment for a second or subsequent offense is not an ex post facto law merely because the prior offense occurred before the statute in question was enacted or became effective.[3]

3. Changes in Procedure and Courts

a. Procedure

§ 357. Generally.—It is firmly established that the prohibition as to the passage of ex post facto laws has no application to changes which relate exclusively to the remedy or mode of procedure.[4] A person has no vested right in any particular remedy[5] and cannot insist on the application to the trial of his case, whether civil or criminal, of any other than the existing rules of procedure.[6] Statutes making changes in the remedy or procedure are always within the discretion of the lawmaking power[7] and are valid so long as they do not deprive the accused of any substantial right[8] or conflict with specific

2 State v. Tyree, 70 Kan. 203, 73 P. 525, 3 Ann. Cas. 1020.

3 Carlesi v. New York, 233 U. S. 51, 58 L. ed. 843, 34 S. Ct. 576; McDonald v. Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 S. Ct. 389; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L.R.A. 256; Re Miller, 110 Mich. 676, 68 N. W. 990, 34 L.R.A. 398, 64 Am. St. Rep. 376; Jones v. State, 9 Okla. Crim. Rep. 646, 133 P. 249, 48 L.R.A.(N.S.) 204; State v. LePitre, 54 Wash. 166, 103 P. 27, 18 Ann. Cas. 922.

Annotation: 58 A.L.R. 21, s. 82 A.L.R. 347; 48 L.R.A.(N.S.) 204; 18 Ann. Cas. 925.

For a detailed discussion, see Second and Subsequent Offenders [Also Criminal Law, 8 R. C. L. p. 271, §§ 284 et seq.].

4 Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Kolkman v. People, 89 Colo. 8, 300 P. 575, citing R. C. L.; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A. (N.S.) 96; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; Corpora v. Kansas City Pub. Serv. Co. 129 Kan. 690, 284 P. 818, citing R. C. L.; State ex rel. Sherburne v. Baker, 50 La. Ann. 1247, 24 So. 240, 69 Am. St. Rep. 472; People v. Qualey, 210 N. Y. 202, 104 N. E. 138, Ann. Cas. 1916A. 1108; Stoker v. People, 53 N. Y. 164, 13 Am. Rep. 492; State v. Whitmore, 126 Ohio St. 381, 185 N. E. 547, citing R. C. L.; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

Annotation: 33 L. ed. 836.

5 Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 252, 4 S. Ct. 202; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; Beaumont Petroleum Syndicate v. Broussard (Tex. Civ. App.) 64 S. W. (2d) 993 (appeal dismissed in Plainview Bldg. & L. Asso. v. Robbins, 123 Tex. 408, 73 S. W. (2d) 92), citing R. C. L.; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

6 Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 904; Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 S. Ct. 384; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; People v. Green, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 884; Garnsey v. Oklahoma, 4 Okla. Crim. Rep. 547, 112 P. 24, 38 L.R.A.(N.S.) 600; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.; State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33, overruled on another point in Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Re Wright, 3 Wyo. 478, 27 P. 565, 14 L.R.A. 748, 31 Am. St. Rep. 94.

Annotation: Ann. Cas. 1912A, 888.

7 Thompson v. Utah, 170 U. S. 43, 42 L. ed. 1061, 18 S. Ct. 620; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; State v. Canfield, 40 Fla. 36, 23 So. 591, 42 L.R.A. 72; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266; Brown v. Buck (Brown v. Circuit Judge) 75 Mich. 274, 42 N. W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438; Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; People v. Green, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 884; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

Annotation: 37 Am. St. Rep. 586.

8 Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16

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and applicable provisions of the Federal Constitution.[9] A state may abolish old remedies and substitute new, or may abolish even without substitution if a reasonable remedy remains,[10] but it cannot deny a remedy entirely.[11] Hence, a mere change in the mode of trial, without changing the nature of the offense or its constituent elements, or the nature or amount of evidence necessary to prove the charge, or altering the punishment, is not an ex post facto law.[12] A change in the laws requiring the jury instead of the court to fix the punishment,[13] as well as one which makes the court instead of the jury judge of the law, is not unconstitutional as being ex post facto.[14]

There may, however, be procedural changes which operate to deny the accused a defense available under the laws in force at the time of the commission of his offense or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition.[15]

§ 358. Affecting Indictments.—While there is a decided conflict of opinion, the weight of authority and the better reason support the view that a statute changing the mode of procedure in criminal cases from indictment to information is not ex post facto, as applied to offenses committed before its passage, and takes away no substantial right of an accused.[16] On the other hand, the view has been taken that the adoption of a law authorizing the prosecution

S. Ct. 904; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119; State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

Annotation: 53 A.L.R. 717.

[9] Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 S. Ct. 220; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

[10] Collector v. Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272; Curtis v. Fielder, 2 Black (U. S.) 461, 17 L. ed. 273; Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

[11] Sawyer v. State, 94 Fla. 60, 113 So. 736, citing R. C. L.; Mattson v. Astoria, 39 Or. 577, 65 P. 1066, 87 Am. St. Rep. 687; Ft. Worth v. Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.

Annotation: 87 Am. St. Rep. 689.

[12] Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728.

Annotation: 1 L.R.A. 632; 13 Am. St. Rep. 739.

Statutory changes in the mode of trial or the rules of evidence which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage are not prohibited as ex post facto laws. And a law providing a joint trial for persons jointly indicted for an offense committed before the statute was passed, while leaving discretionary power in the court to direct separate trials for good cause shown, is not invalid as an ex post facto law. Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68.

As to the alteration of rules of evidence, see infra, § 359.

[13] State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

[14] State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

[15] Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443.

[16] People v. Campbell, 59 Cal. 243, 43 Am. Rep. 257; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; State v. Whitmore, 126 Ohio St. 381, 185 N. E. 547, citing R. C. L.; Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.

Annotation: 53 A.L.R. 717; 38 L.R.A. (N.S.) 600.

An act providing for prosecution by information, intended to take effect retrospectively, relates to a matter of procedure only, and does not constitute an ex post facto law as to an offense committed before its passage when prosecutions were by indictment. Re Wright, 3 Wyo. 478, 27 P. 565, 13 L.R.A. 748, 31 Am. St. Rep. 94.

of crimes already committed by information instead of by indictment is forbidden by the ex post facto clause of the Constitution, on the theory that the right to an indictment is a substantial right of the accused.[17] Laws are not ex post facto which, after the commission of an offense, allow amendments to pending indictments, thus preventing the defendant from taking advantage of variances in the indictment.[18] A statute permitting the consolidation into one indictment of charges of crimes of a similar nature or constituting parts of a common plan or scheme is not, as applied to crimes committed prior to its enactment, violative of the ex post facto clause of the Federal Constitution,[19] nor is such statute rendered ex post facto because there would have been more peremptory challenges available to the defendants had they been tried separately.[20]

§ 359. Affecting Evidence.—The general rule is that any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, may be obnoxious to the constitutional inhibition upon ex post facto laws.[1] This rule applies to changes in the measure or character of evidence requisite to conviction,[2] where the situation of an accused is altered to his disadvantage either by excluding evidence in his behalf which was admissible at the time of the alleged commission of his offense, or by admitting evidence against him which was inadmissible at such time.[3] Hence, the repeal, after the commission of an alleged forgery, of a statute which prevented the use against an accused person of any evidence obtained from him by means of any judicial proceeding, has been held to be ex post facto and invalid, where the crime could not have been established without the aid of the record in another suit.[4] Furthermore, a law which would permit a conviction for bigamy by circumstantial evidence as to the marriages, when the law in force at the time of the alleged offense required direct proof of such marriages, is an ex post facto law.[5] Statutes may, however, properly alter the force to be given to designated facts in determining whether certain presumptions shall or shall not arise, for it cannot be said that a person has any vested right in a presumption of innocence,[6] in a rule of evidence, or in any other

[17] Garnsey v. State, 4 Okla. Crim. Rep. 547, 112 P. 24, 38 L.R.A.(N.S.) 600.

Annotation: 53 A.L.R. 717; 38 L.R.A. (N.S.) 600.

[18] State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

[19] People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303.

Annotation: 110 A.L.R. 1308.

[20] People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303.

See infra, § 362.

[1] Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. Ct. 202; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; State v. Johnson, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241.

Annotation: 37 L.R.A.(N.S.) 96; 37 Am. St. Rep. 594.

Statutory changes in the rules of evidence which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage are not prohibited as ex post facto laws. Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68.

[2] Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96.

[3] Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96.

Annotation: 37 L.R.A.(N.S.) 97; 37 Am. St. Rep. 594.

[4] Frisby v. United States, 38 App. D. C. 22, 37 L.R.A.(N.S.) 96.

Annotation: 37 L.R.A.(N.S.) 96.

[5] State v. Johnson, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241.

Annotation: 37 L.R.A.(N.S.) 97.

[6] Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L.R.A.(N.S.) 626.

presumption; and if the change affects the remedy only, it is within the constitutional power of the legislature to make,[7] unless such change goes to the extent of the practical denial of a constitutional right.[8] In recent years some doubts have been expressed as to whether every law which may come within the rule concerning evidence is really an ex post facto law,[9] with the result that the general rule has been limited to some extent in that it does not apply to rules which merely relate to the mode of presenting questions and proof as to the relative credibility or genuineness of evidence, where the right of the jury to determine the sufficiency or effect of the evidence, for example, as between disputed and genuine writings, is left unimpaired.[10] On the basis that it is a change in procedure and does not deprive the accused of a substantial right, a statute permitting depositions to be taken by the state in a criminal matter is not ex post facto.[11]

§ 360. Affecting Witnesses.—The prohibition relating to ex post facto matters generally has no application to statutory changes which merely affect the competency of witnesses to testify. Such statutes are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done and which was innocent when done, nor do they aggravate any crime theretofore committed, provide a greater punishment therefor than was prescribed at the time of its commission, or alter the degree or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed.[12] These statutes, however, have been held unconstitutonal in some jurisdictions on the ground that they are an unconstitutional invasion by the legislature of the governor's sole right to pardon as conferred on him by the state Constitution.[13]

[7] Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; Burk v. Putnam, 113 Iowa, 232, 84 N. W. 1053, 86 Am. St. Rep. 372; State v. Heldenbrand, 62 Neb. 136, 87 N. W. 25, 89 Am. St. Rep. 743; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L.R.A.(N.S.) 626; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Ex parte Parker, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7 Ann. Cas. 874.

Annotation: 86 Am. St. Rep. 375.

[8] Ex parte Parker, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7 Ann. Cas. 874.

[9] State v. Pleason, 56 N. D. 499, 218 N. W. 154, citing R. C. L.

See supra, § 348.

[10] Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. Ct. 922; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119.

Annotation: 37 L.R.A.(N.S.) 97; 37 Am. St. Rep. 594.

A statute permitting the admission in evidence, for the purposes of comparison with a disputed handwriting, of other writings proved or admitted to be genuine, is not an ex post facto law in respect to a prosecution for a crime committed before the statute was passed. Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. Ct. 922.

[11] People v. Qualey, 210 N. Y. 202, 104 N. E. 138, Ann. Cas. 1916A, 1108.

Annotation: 90 A.L.R. 381.

[12] Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68; Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. Ct. 922; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 S. Ct. 904; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. Ct. 202; O'Bryan v. Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595; Mrous v. State, 31 Tex. Crim. Rep. 597, 21 S. W. 794, 37 Am. St. Rep. 834; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

Annotation: 63 A.L.R. 982; 37 L.R.A.(N.S.) 97; 37 Am. St. Rep. 594.

A statute making admissible the testimony of convicts confined in the state penitentiary in cases where such testimony becomes material, and the alleged offense is committed in the penitentiary or upon a state farm, is not an ex post facto law because it makes admissible the testimony of persons who, at the time of the commission of the offense, were unable to testify regarding it. Underwood v. State, 111 Tex. Crim. Rep. 124, 12 S. W. (2d) 206, 63 A.L.R. 978.

For a detailed discussion as to the power of the legislature, see WITNESSES [Also 28 R. C. L. p. 419, § 2].

[13] See supra, §§ 186 et seq.

b. COURTS

§ 361. As to Tribunals, Jurisdiction, and Venue.—In accordance with the general principle that the constitutional prohibition as to the passage of ex post facto laws does not prevent the legislature from making changes in procedure,[14] it is well established that changes as to judicial tribunals generally are to be considered as relating to the remedy only.[15] Therefore, without coming within the terms of this constitutional prohibition, a state may abolish old courts and create new ones,[16] enlarge or diminish the powers of an existing court,[17] create appellate jurisdiction where none existed before,[18] transfer jurisdiction from one court or tribunal to another,[19] make changes as to the number of judges who shall preside at a trial,[20] make changes as to venue,[1]

[14] See supra, §§ 357 et seq.

[15] Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 S. Ct. 611; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465, overruled on another point in State v. Ardoin, 51 La. Ann. 169, 24 So. 802, 72 Am. St. Rep. 454.

Annotation: Ann. Cas. 1912A, 888.

A statute requiring proceedings and trials in criminal cases past and future to take place in a district created by it is not a matter of substantive law, but one of jurisdiction and procedure only. Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 S. Ct. 611.

[16] Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; People v. Green, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 884; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728; State v. Bates, 14 Utah, 293, 47 P. 78, 43 L.R.A. 33; Re Wright, 3 Wyo. 478, 27 P. 565, 14 L.R.A. 748, 31 Am. St. Rep. 94.

Annotation: 33 L. ed. 836; 37 Am. St. Rep. 595; Ann. Cas. 1912A, 888.

See COURTS [Also 7 R. C. L. p. 976, §§ 4 et seq.].

[17] People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728.

Annotation: 37 Am. St. Rep. 595.

[18] Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570.

Annotation: Ann. Cas. 1912A, 888.

The provision for an appeal by the state in a criminal case from the grant of a new trial, which was enacted by the North Carolina Act of March 6, 1899, is not ex post facto in violation of U. S. Const. Art. 1, § 10, as applied to cases in which the trial had been had, though the new trial has not been granted, before the statute was passed. Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730.

[19] People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; People v. Green, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 884; State v. Cooler, 30 S. C. 105, 8 S. E. 692, 3 L.R.A. 181.

Annotation: 33 L. ed. 836; 37 Am. St. Rep. 595; Ann. Cas. 1912A, 888.

Under the principle permitting the substitution of one tribunal for another as triers of questions of law, the legislature may repeal provisions existing at the time of the commission of an offense which direct that juries shall be judges of the law as well as of the facts, and may require that all questions of law shall, following such repeal, be tried by the judge. Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[20] People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119.

Annotation: 37 L.R.A.(N.S.) 567; Ann. Cas. 1912C, 1121.

A statute providing that capital cases may be tried before one judge, instead of two or more as theretofore, is not ex post facto as applied to a prior offense, though it leaves matters of discretion for decision by one presiding judge, where prior thereto such matters were decided by two or more judges. Com. v. Phelps, 210 Mass. 78, 96 N. E. 349, 37 L.R.A.(N.S.) 567, Ann. Cas. 1912C, 1119.

[1] Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 S. Ct. 611; Cook v. United States, 138 U. S. 157, 34 L. ed. 906, 11 S. Ct. 268; Gut v. Minnesota, 9 Wall. (U. S.) 35, 19 L. ed. 573; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834.

Annotation: Ann. Cas. 1912A, 888.

It is discretionary with the legislature when granting, limiting, or redistributing jurisdiction in criminal cases to include past offenses. Post v. United States, 161 U. S. 583, 40 L. ed. 816, 16 S. Ct. 611.

A Federal statute is not an ex post facto law in that it subjects one accused of murder in the public land strip, committed previous to the passage of that statute, to trial in the eastern district of Texas rather than in some other judicial district, as this does not alter his situation in respect of the offense or its consequences. Cook v. United States, 138 U. S. 157, 34 L. ed. 906, 11 S. Ct. 268.

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and, generally, effect any other changes in the modes of procedure or in the instrumentalities of justice, so long as all the substantial protections with which the existing law surrounds the person accused of crime are left unimpaired.[2]

4. Miscellaneous Matters

§ 362. Miscellaneous Rights Protected.—In deciding what rights are protected by the ex post facto clause the difficulty lies in determining whether particular statutes by their operation take from an accused any right which was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty and which he enjoyed at the time of the commission of the offense charged against him.[3] Among the matters held to constitute substantial rights which cannot be taken away by retrospective legislation are the effect of a conviction of murder in the second degree as an acquittal of murder in the first degree, even though such judgment of conviction should be subsequently reversed,[4] and deductions for good conduct and permits to be at liberty, to which prisoners were entitled in respect to offenses committed prior to the passage of a statute abolishing the right thereto, though statutes relating to penal administration or prison discipline are not necessarily objectionable as being ex post facto merely because they may enhance the severity of the confinement.[5] In some jurisdictions the courts have decided that laws relating to the indeterminate sentence of convicts are not ex post facto where their effect is to substitute a new and different method of crediting good time to the convict.[6] A statutory right to have sentence suspended on giving bond in a designated sum in the event of conviction has been held to be a substantial one, affording a means of escaping imprisonment, so that a subsequent statute requiring a bond in a much larger sum was unconstitutional.[7] In general, any law passed after the commission of the offense which changes any substantial rights in connection with the right to a trial by jury is ex post facto.[8] The granting or withholding of peremptory challenges, however, is solely a matter of procedure; and the rule is established that a law curtailing the number of peremptory challenges which a defendant may have in the impaneling of a trial jury, enacted after the commission of the offense charged, is not ex post facto as to such offense.[9] On the same principle a subsequent act increasing the number of the state's peremptory challenges is not ex post facto.[10] In the case of statutes effecting a change in the number of

2 Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; People v. Green, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912A, 884.

A statute dividing the Supreme Court of a state into divisions, whereby a person convicted can have a review of his conviction by only part of the judges who constituted the appellate court when the crime was committed, is not an ex post facto law. Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 S. Ct. 570.

3 Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620.

4 Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 S. Ct. 922; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 S. Ct. 202; Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; State v. Tyree, 70 Kan. 203, 78 P. 525, 3 Ann. Cas. 1020.
Annotation: 45 Am. Rep. 541.

5 Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266.

6 Davis v. State, 152 Ind. 34, 51 N. E. 928, 71 Am. St. Rep. 322.
See also supra, § 356.

7 State v. McCoy, 87 Neb. 385, 127 N. W. 137, 28 L.R.A.(N.S.) 583.

8 Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 S. Ct. 620.
For a detailed discussion, see Jury [Also 16 R. C. L. p. 222, § 38].

9 People ex rel. Pincus v. Adams, 274 N. Y. 447, 9 N. E. (2d) 46, 110 A.L.R. 1303; Harris v. United States, 4 Okla. Crim. Rep. 317, 111 P. 982, 31 L.R.A.(N.S.) 820, Ann. Cas. 1912B, 810; People ex rel. Chandler v. McDonald, 5 Wyo. 526, 42 P. 15, 29 L.R.A. 834. See also Ashe v. United States, 270 U. S. 424, 70 L. ed. 662, 46 S. Ct. 333.
Annotation: 33 L. ed. 836; 31 L.R.A. (N.S.) 820.

10 State v. Hoyt, 47 Conn. 518, 36 Am.

grand jurors, it is generally held that such a statute does not constitute ex post facto legislation when applied to offenses committed before its passage,[11] although there is some authority to the contrary.[12] A statute made applicable to pending prosecutions which provides for separate trials for persons jointly indicted only when granted by the court for good cause shown, rather than as a matter of right as formerly provided, is not ex post facto;[13] and a law granting the right of appeal to the state is not an ex post facto law within the meaning of the Constitution.[14]

§ 363. Test Oaths.—Soon after the Civil War laws were passed by Congress and by some of the states establishing test oaths to be required of all persons desiring to practice certain professions. In some instances these statutes required numerous distinct affirmations respecting past conduct, extending even to words, desires, and sympathies in reference to matters involved in that war. The Supreme Court of the United States, when the validity of these statutes was called in question, adopted the view that as many of the matters provided for in these oaths bore no relation to the fitness or qualification of the parties to follow the profession in question, such as a minister of the Gospel or an attorney and counselor, the oaths should be considered, not as legitimate tests of qualifications, but in the nature of penalties for past offenses.[15] The statutes establishing these test oaths have been held to be ex post facto laws, not only because they punished, in a manner not before penalized by law, offenses committed before their passage, but also because they instituted a new rule of evidence in aid of conviction.[16] These statutes also deprived parties of exist-

Rep. 89; Harris v. United States, 4 Okla. Crim. Rep. 317, 111 P. 982, 31 L.R.A.(N.S.) 820, Ann. Cas. 1912B, 810.
Annotation: 31 L.R.A.(N.S.) 820.

11 State v. Caldwell, 50 La. Ann. 666, 23 So. 869, 41 L.R.A. 718, 69 Am. St. Rep. 465; State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706.
Annotation: 53 A.L.R. 720.

A state Constitution provided that "no person shall be held to answer for a capital, felonious, or infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the militia when in actual service in time of war or public danger." The statutes of the state prior to the adoption of the Constitution and for a time thereafter provided that a grand jury should be composed of twenty-one persons and that twelve must concur in finding an indictment. The court held that the amendment to the state Constitution providing, among other things, that a grand jury should, unless otherwise provided by law, consist of twelve in number and that of such number at least eight must concur in finding an indictment does not disparage any substantial or constitutional guaranty and is not ex post facto, therefore, in applying to offenses committed prior to its adoption. State v. Kavanaugh, 32 N. M. 404, 258 P. 209, 53 A.L.R. 706.

12 Annotation: 53 A.L.R. 720.

13 Beazell v. Ohio, 269 U. S. 167, 70 L. ed. 216, 46 S. Ct. 68.
Annotation: 110 A.L.R. 1308.

14 Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730.

15 Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 S. Ct. 730; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 S. Ct. 573; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231 (doctor); Burgess v. Salmon, 97 U. S. 381, 24 L. ed. 1104; Pierce v. Carskadon, 16 Wall. (U. S.) 234, 21 L. ed. 276; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366 (lawyer); Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356 (priest); Meffert v. State Bd. of Medical Registration (Meffert v. Packer) 66 Kan. 710, 72 P. 247, 1 L.R.A.(N.S.) 811, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 S. Ct. 790 (doctor); Boyd v. Mills, 53 Kan. 594, 37 P. 16, 25 L.R.A. 486, 42 Am. St. Rep. 306 (elective office); Davis v. Pierse, 7 Minn. 13, Gil. 1, 82 Am. Dec. 65.

An act which requires, as a condition upon which a rehearing of a case could be had, that the defendant should take an oath that he had never voluntarily borne arms against the United States, the reorganized government of Virginia, or the State of West Virginia is an ex post facto law and void. Pierce v. Carskadon, 16 Wall. (U. S.) 234, 21 L. ed. 276.

A test oath required of a priest as a condition for exercising the functions of his office, to the effect that he had always been loyal, is unconstitutional as an ex post facto law. Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

16 Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366.

Disqualification for past conduct, from office or from the pursuit of a profession or of any lawful vocation, is a punishment and, therefore, is within the inhibition of the Constitution against the passage of an ex post facto law. Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. ed. 356.

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ing rights for past misconduct and without judicial trial, and for this reason partook of the nature of a bill of pains and penalties and were subject to the constitutional inhibition against the passage of bills of attainder.[17] In this connection it may be mentioned that the disfranchisement of people who have performed certain acts or continue to perform these acts after passage of the act providing for disfranchisement is not precluded by the prohibition of the ex post facto clause since such an act is not punishment but rather removes or revokes a privilege.[18]

§ 364. Amendment of Statutes.—The principles as to ex post facto laws have an extensive application to that class of cases in which, after the commission of an offense and before trial, a penal statute is amended or repealed and a new statute is enacted. An act is not ex post facto as to prior crimes merely because it continues in force laws which existed when such crimes were committed and which would cease to be operative if not kept alive by such statute.[19] If an act is criminal and punishable when committed and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage and, accordingly, such statute is not an ex post facto law. When the same offense is defined in the same way by both the earlier and the later statute, the courts refuse to recognize that there is any interval in which there was no law defining the offense.[20] The situation occasionally arises that the offender cannot be punished under the old law because it has been repealed or under the amended law because, as to him, it is an ex post facto law. Thus, where a change in a penal statute is made after the commission of an offense and before trial, by means of which the crime is so defined as to make criminal something which was before lawful, it has been held that the offender cannot be punished under either statute.[1] The legislature cannot give retrospective criminality to acts committed before passage of the construing statute by construing it as leaving in force a criminal law which has been declared to have been repealed by the courts, and which were not criminal except for the statutes held to have been repealed.[2]

C. Retrospective Laws

1. Constitutional Limitations

§ 365. Generally.—The Constitution of the United States does not in terms prohibit the enactment by the states of retrospective laws which do not impair the obligation of contracts or partake of the character of ex post facto laws.[3]

[17] Kring v. Missouri, 107 U. S. 221, 27 L. ed. 506, 2 S. Ct. 443; Pierce v. Carskadon, 16 Wall. (U. S.) 234, 21 L. ed. 276.

As to bills of attainder, see supra, § 347.

[18] Murphy v. Ramsey, 114 U. S. 15, 29 L. ed. 47, 5 S. Ct. 747; Boyd v. Mills, 53 Kan. 594, 37 P. 16, 25 L.R.A. 486, 42 Am. St. Rep. 306.

The disfranchisement, under a Federal act, of a man who, having contracted a bigamous or polygamous marriage and become the husband at one time of two or more wives, maintains that relation and status at the time when he offers to be registered as a voter, is not ex post facto, although, since the passage of that act, he may not have cohabited with more than one woman. The disfranchisement operates upon the existing state and condition of the person, and not upon the past offense. Murphy v. Ramsey, 114 U. S. 15, 29 L. ed. 47, 5 S. Ct. 747.

For a detailed discussion, see Elections [Also 9 R. C. L. p. 1045, § 62].

[19] People v. Jordan, 92 Cal. App. 543, 268 P. 373, citing R. C. L.; Ex parte Larkin, 1 Okla. 53, 25 P. 745, 11 L.R.A. 418.

[20] People v. Jordan, 92 Cal. App. 543, 268 P. 373, citing R. C. L.

Annotation: 37 Am. St. Rep. 585.

[1] Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am. St. Rep. 674. See also Wilson v. Ohio & M. R. Co. 64 Ill. 542, 16 Am. Rep. 565.

[2] United States v. Stafoff, 260 U. S. 477, 67 L. ed. 358, 43 S. Ct. 197.

[3] Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 S. Ct. 475; Blount v. Windley, 95 U. S. 173, 24 L. ed. 424; Randall v. Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Curtis v. Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513 (dictum); Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508; Locke v. New Orleans, 4 Wall. (U. S.) 172, 18 L. ed. 334 (dictum); Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Aldridge v. Tuscumbia, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; International Mortg. Trust Co. v. Henry, 139 Kan. 154, 30 P. (2d) 311, citing R. C. L.; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A.(N.S.) 680, Ann. Cas. 1913C, 317; Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A.(N.S.) 832; Durrett v. Davidson, 122 Ky. 851, 93 S. W. 25, 8 L.R.A.(N.S.) 546; Henderson & N. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Baugher v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; J. B. Preston Co. v. Funkhouser, 261 N. Y. 140, 639, 184 N. E. 737, 185 N. E. 772, 87 A.L.R. 459, affirmed in 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Myatt v. Ponca City Land & Improv. Co. 14 Okla. 189, 78 P. 185, 68 L.R.A. 810; Re Boalt, 123 Or. 1, 260 P. 1004, citing R. C. L.; Fuller v. Hager, 47 Or. 242, 83 P. 782, 114 Am. St. Rep. 916; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66; Smith v. Northern Neck Mut. Fire Asso. 112 Va. 192, 70 S. E. 482, 38 L.R.A.(N.S.) 1016; Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025; McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L.R.A. 609.

Annotation: 77 A.L.R. 1338; 28 L. ed. 331; 41 L. ed. 94; 14 L.R.A. 721.

A state statute may be retrospective in its character and may divest vested rights without violating the Constitution of the United States, unless it also impairs the obligation of a contract. Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773.

The mere fact that a statute is retroactive does not bring it into conflict with the Federal Constitution. J. B. Preston Co. v. Funkhouser, 261 N. Y. 140, 639, 184 N. E. 737, 185 N. E. 772, 87 A.L.R. 459, affirmed in 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134.

Thus, prior to the enactment of the Fourteenth Amendment to the Federal Constitution, a retrospective law, unless falling within other constitutional inhibitions, could constitutionally operate to divest property rights.[4] After the passage of the Fourteenth Amendment, however, the protection afforded by the due process clause was extended so as to prevent retrospective laws from divesting rights of property and vested rights.[5] In the absence of an express constitutional inhibition, retrospective laws are not prohibited as such. Such a law cannot be held invalid unless it violates some other constitutional provision.[6] On the other hand, legislation having a retrospective aspect must be carefully scrutinized if its constitutionality is questioned, because of abuses which may result therefrom.[7] Nevertheless, while retrospective laws are ordinarily deemed to be oppressive, there are cases in which laws may justly, and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement.[8]

"It is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property." Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876. Annotation: 28 L. ed. 331.

[4] See infra, §§ 368, 369.

As to due process, see Vol. 12, Subd. XIV.

[5] Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458; Durrett v. Davidson, 122 Ky. 851, 93 S. W. 25, 8 L.R.A.(N.S.) 546; Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 69.

[6] Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389.

Annotation: 41 L. ed. 95.

For a detailed discussion, see Statutes [Also 25 R. C. L. p. 786, § 35].

[7] Blount v. Windley, 95 U. S. 173, 24 L. ed. 424; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Mills v. Geer, 111 Ga. 275, 36 S. E. 673, 52 L.R.A. 934; Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 13 S. E. 493, 14 L.R.A. 721; State ex rel. Boynton v. Public Serv. Commission,

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§ 366. State Constitutional Provisions.—In many of the states there are constitutional provisions expressly prohibiting, not only the passage of any ex post facto law or law impairing the obligation of contracts, but any statute retrospective in its operation.[9] In other states there are no constitutional provisions directly forbidding the enactment of retrospective laws.[10]

A constitutional provision prohibiting retrospective laws covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of such right,[11] and covers also all such laws as take away or impair any vested right acquired under existing laws, create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already past.[12] A retrospective statute which extends the time for redemption from a judicial sale, tax sale, or mortgage foreclosure sale or which gives such a right where none existed before is unconstitutional.[13]

In those states where retroactive or retrospective laws are specifically forbidden by the Constitution, there are, nevertheless, certain classes of statutes

135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

9 French v. Deane, 19 Colo. 504, 36 P. 609, 24 L.R.A. 387; Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510; Westerman v. Supreme Lodge, K. P. 196 Mo. 670, 94 S. W. 470, 5 L.R.A.(N.S.) 1114; Spring Hill Cemetery v. Lindsey, 162 Tenn. 420, 37 S. W. (2d) 111, citing R. C. L.

See also Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. ed. 508 (wherein it was held that the Federal Constitution does not prohibit retrospective laws and that such laws are valid providing there is no inhibition in the Constitution of the state); Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469.

Annotation: 77 A.L.R. 1338; 41 L. ed. 94.

Retroactive laws, under that specific name, are forbidden, by the Constitutions of seven states: Colorado, Louisiana, Missouri, New Hampshire, Ohio, Tennessee, and Texas. Annotation: 41 L. ed. 94.

The reader also should consult his own state Constitution.

In the early Constitution of Ohio there was no provision prohibiting retrospective laws, but the last Constitution of Ohio provides specifically that "the general assembly shall have no power to pass retrospective laws." 8 Ohio Jur. p. 543, § 413.

The Constitution of Oklahoma, § 54, Art. 5, provides, among other things, that the repeal of a statute shall not "affect any accrued right." Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

The Texas Constitution, Art. 1, § 16, prohibits the enactment of any retroactive law. 9 Texas Jur. § 101, p. 536.

10 Ross v. Wright County, 128 Iowa, 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431; Swartz v. Carlisle, 237 Pa. 473, 85 A. 847, Ann. Cas. 1914B, 458; Prata Undertaking Co. v. State Bd. of Embalming, 55 R. I. 454, 182 A. 808, 104 A.L.R. 389; McLure v. Melton, 24 S. C. 559, 58 Am. Rep. 272, writ of error dismissed in 133 U. S. 380, 33 L. ed. 660, 10 S. Ct. 407; State ex rel. Stain v. Christensen, 84 Utah, 185, 35 P. (2d) 775.

Annotation: 1 L.R.A.(N.S.) 431.

11 Ross v. Lettice, 134 Ga. 866, 68 S. E. 734, 137 Am. St. Rep. 281; Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510; State v. Switzler, 143 Mo. 287, 45 S. W. 245, 40 L.R.A. 280, 65 Am. St. Rep. 653; Towle v. Eastern R. Co. 18 N. H. 547, 47 Am. Dec. 153; Hamilton County v. Rosche, 50 Ohio St. 103, 33 N. E. 408, 19 L.R.A. 584, 40 Am. St. Rep. 653; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100.

12 Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 S. Ct. 1014; New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521; British American Assur. Co. v. Colorado & S. R. Co. 52 Colo. 589, 125 P. 508, 1135, 41 L.R.A.(N.S.) 1202; French v. Deane, 19 Colo. 504, 36 P. 609, 24 L.R.A. 387; Ross v. Lettice, 134 Ga. 866, 68 S. E. 734, 137 Am. St. Rep. 281; Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; Dow v. Norris, 4 N. H. 16, 17 Am. Dec. 400; Hamilton County v. Rosche, 50 Ohio St. 103, 33 N. E. 408, 19 L.R.A. 584, 40 Am. St. Rep. 653; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331; Shields v. Clifton Hill Land Co. 94 Tenn. 123, 28 S. W. 668, 26 L.R.A. 509, 45 Am. St. Rep. 700; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

The constitutional inhibition against retroactive legislation is against such legislation as injuriously affects individuals and their vested rights. New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521.

According to Mr. Justice Story's definition, quoted in Smith v. Dirckx, 283 Mo. 188, 223 S. W. 104, 11 A.L.R. 510, "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Annotation: 52 L.R.A. 935.

Legislation imposing liability where none previously existed cannot operate retrospectively. Lewis v. Pennsylvania R. Co. 220 Pa. 317, 69 A. 821, 18 L.R.A.(N.S.) 279.

13 Annotation: 1 A.L.R. 143, s. 38 A.L.R. 230, and 89 A.L.R. 966.

For a detailed discussion, see JUDICIAL SALES [Also 16 R. C. L. p. 141, § 103]; MORTGAGES [Also 19 R. C. L. p. 652, § 469]; TAXATION [Also 26 R. C. L. p. 434, § 390].

of that character which are held valid as being salutary and wholesome regulations and not within a just construction of the inhibition,[14] although it has been said that public policy standing alone and in the absence of statute will not be allowed to operate to divest vested rights.[15] Regardless of whether retroactive laws are specifically prohibited due to the Fourteenth Amendment to the Federal Constitution, the legislature cannot pass any law divesting settled rights of property[16] except under the police power[17] or by the exercise of eminent domain.[18] A state, however, may constitutionally pass a retroactive law which impairs its own rights.[19] A change of judicial construction of a statute should be given the same effect in its operation on existing rights and contracts that would be given a legislative amendment, that is, to make such change prospective, but not retroactive.[20]

§ 367. Operation of Rule; Exceptions.—Restrospective laws relate to civil rights and civil proceedings.[1] The term "retrospective" has a meaning analogous to the words "ex post facto" as applied to criminal and penal statutes.[2] In some instances, however, the term has been used broadly to include any statute which operates retrospectively. In this broad sense it includes ex post facto laws.[3] The courts have recognized that without violating a constitutional prohibition as to retrospective legislation the state may make laws for the extenuation or mitigation of offenses,[4] laws for the enforcement of existing contracts,[5] and, in general, laws curing defects in the remedy, confirming rights already existing, or adding to the means of securing and enforcing them.[6] If a retrospective act which is neither an ex post facto law nor one

14 Chestnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Annotation: 41 L. ed. 94.

8 Ohio Jur. p. 555, § 422.

15 Oleff v. Hodapp, 129 Ohio St. 432, 195 N. E. 838, 98 A.L.R. 764.

Murder of one joint tenant by the other will not, in the absence of statute, deprive the latter of vested rights under the joint tenancy agreement. Ibid.

16 See Vol. 12, Subd. XIV.

17 **A vested interest** cannot be asserted against the exercise of the police power because of conditions once obtaining. Hadacheck v. Sebastian, 239 U. S. 394, 60 L. ed. 348, 36 S. Ct. 143, Ann. Cas. 1917B, 927.

See supra, §§ 268, 269.

18 See EMINENT DOMAIN [Also 10 R. C. L. p. 74, § 65].

19 Annotation: 41 L. ed. 97.

See also League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 S. Ct. 475.

20 Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968.

For a detailed discussion, see COURTS [Also 7 R. C. L. p. 1010, § 36].

1 Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Davis & McMillan v. Industrial Acci. Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L.R.A. 880, 95 Am. St. Rep. 517; Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025.

Annotation: 28 L. ed. 331.

2 French v. Deane, 19 Colo. 504, 36 P. 609, 24 L.R.A. 387.

See supra, § 343.

See STATUTES [Also 25 R. C. L. pp. 785 et seq.].

3 Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. ed. 648; Aldridge v. Tuscumbia, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Re Clark, 86 Kan. 539, 121 P. 492, 39 L.R.A.(N.S.) 680, Ann. Cas. 1913C, 317; Henderson & N. R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; State v. Kyle, 166 Mo. 287, 65 S. W. 763, 56 L.R.A. 115; Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L.R.A. 632, 13 Am. St. Rep. 728; State ex rel. Stain v. Christensen, 84 Utah, 185, 35 P. (2d) 775, citing R. C. L.

Annotation: 66 Am. Dec. 152.

As to what constitutes an ex post facto law, see supra, § 348.

4 State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

See supra, § 353.

5 Titus v. Titus, 96 Colo. 191, 41 P. (2d) 244, citing R. C. L.; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; McLain v. Oklahoma Cotton Growers' Asso. 125 Okla. 264, 258 P. 269, citing R. C. L.; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

See Vol. 12, Subd. XI.

6 Downs v. Blount (C. C. A. 5th) 170 F.

impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to the Fourteenth Amendment of the Federal Constitution guaranteeing due process of law[7] or for some other constitutional reason, as, for example, where it amounts to an improper assumption of judicial power by the legislature.[8]

Exceptions exist to the general prohibition against retrospective laws, for such a constitutional provision does not inhibit certain retrospective laws made in furtherance of the police power of the state[9] or laws which, although they may directly operate on vested rights, are, nevertheless, promotive of justice and the general good.[10] It is generally held that the fact that statutes awarding attorneys' fees, which are valid exercises of the police power or of the power to prescribe costs, operate retrospectively will not render them unconstitutional.[11] The cases generally proceed upon the theory that such a statute affects the remedy merely and does not impair vested rights or the obligation of contract.[12] There is, however, authority supporting the contrary view on the theory that such an act impairs the obligation of contract or violates the state constitutional prohibition directed against the passage of retrospective laws.[13]

Declaratory statutes likewise form an exception to the constitutional inhibition under consideration. While it is recognized that the legislature cannot in general establish a rule to operate retrospectively, when a rule of the law is unsettled, the legislature may settle it, and such a rule necessarily operates both prospectively and retrospectively.[14]

There seems to be no question that, at least, in the absence of an express

15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 381, 33 S. Ct. 216; Titus v. Titus, 96 Colo. 191, 41 P. (2d) 244, citing R. C. L.; Mills v. Geer, 111 Ga. 275, 36 S. E. 673, 52 L.R.A. 934; Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 13 S. E. 493, 14 L.R.A. 721; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; McLain v. Oklahoma Cotton Growers' Asso. 125 Okla. 264, 258 P. 269, citing R. C. L.; Wynne v. Wynne, 2 Swan (Tenn.) 405, 58 Am. Dec. 66.

Annotation: 14 L.R.A. 721; 52 L.R.A. 934.

As to curative and remedial legislation, see infra, §§ 379 et seq.

7 Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428; Aldridge v. Tuscumbia, C. & D. R. Co. 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; Fall River Irrig. Dist. v. Mt. Shasta Power Corp. 202 Cal. 56, 259 P. 444, 52 A.L.R. 264; Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426; Sanford v. McClelland, 121 Fla. 253, 163 So. 513, citing R. C. L.; State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Booth v. Hairston, 193 N. C. 278, 195 N. C. 8, 136 S. E. 879, 141 S. E. 480, 57 A.L.R. 1186; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567.

See Vol. 12, Subd. XIV.

See 9 Tex. Jur. p. 527, § 94.

8 State ex rel. Boynton v. Public Serv. Commission, 135 Kan. 491, 11 P. (2d) 999, citing R. C. L.; Gem v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237.

As to what constitutes an improper assumption of judicial power by the legislature, see supra, §§ 208 et seq.

9 Shields v. Clifton Hill Land Co. 94 Tenn. 123, 28 S. W. 668, 26 L.R.A. 509, 45 Am. St. Rep. 700; Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L.R.A.(N.S.) 487.

Legislative interference with vested rights cannot extend beyond measures necessary in the exercise of the police power. Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L.R.A.(N.S.) 487.

10 Blount v. Windley, 95 U. S. 174, 24 L. ed. 424; Davis & McMillan v. Industrial Acci. Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095.

Annotation: 41 L. ed. 94.

11 Germania F. Ins. Co. v. Bally, 19 Ariz. 580, 173 P. 1052, 1 A.L.R. 488; Norman's Case, 278 Mass. 464, 180 N. E. 238, 82 A.L.R. 885; Ahmed's Case, 278 Mass. 180, 179 N. E. 684, 79 A.L.R. 669; Reed v. American Bonding Co. 102 Neb. 113, 166 N. W. 196, L.R.A.1918C, 63; Spicer v. Benefit Asso. R. E. 142 Or. 588, 21 P. (2d) 187, 90 A.L.R. 517.

Annotation: 90 A.L.R. 537.

12 Annotation: 90 A.L.R. 538.

13 Annotation: 90 A.L.R. 539.

As to the constitutionality of statutes relating to costs generally, see COSTS [Also 7 R. C. L. p. 781, § 2].

14 Peyton v. Smith, 15 S. C. L. (4 M'Cord) 476, 17 Am. Dec. 758; State ex rel. Stain v. Christensen, 84 Utah, 185, 35 P. (2d) 775, citing R. C. L.

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constitutional provision inhibiting the enactment of retrospective laws, income taxes having a retroactive effect may be lawfully enacted.[15]

2. Impairment of Vested Rights

a. Constitutional Provisions

§ 368. Generally.—It frequently occurs in the consideration of questions of constitutional law that the validity of any particular statute may depend on the application of numerous principles and the weighing of conflicting interests and rights. This is well illustrated in the case of vested rights. A law may be unconstitutional through its retrospective operation, whereby it impairs vested rights.[16] It may also be invalid as interfering with a fundamental right of property where the vested right is looked on as constituting such property.[17] Even if the vested right is to be treated as property and one which cannot be impaired by retrospective legislation, it may be a right which is subject to regulation under the police power.[18] Finally, that which has been determined to amount to a vested right may be property which is subject to the guaranty of due process of law. The several principles of constitutional law bearing on the validity of such a statute may blend together, or at least they may not be clearly and separately stated by the judicial tribunals in applying them to particular situations. For example, to the extent that certain property is subject to the police power, it may to a corresponding extent be removed from the sheltering arm of the constitutional guaranty as to due process of law. It seems to be important that these distinctions should be kept in mind as far as possible in consideration of the subject of retrospective legislation affecting or divesting vested rights. It should not be forgotten that in the decision that a particular right to a thing is a vested right there is also involved to a large extent a determination that it constitutes property within the protection of the guaranty as to due process of law, and that in reaching a contrary decision that no vested right exists in the doing of a particular thing or using property in a given manner, there is an implication that the legislature for a proper purpose may regulate and possibly, under its police power, terminate and put an end to any further similar action or use of such property. The difficulties of laying down general tests and the frequency with which the courts use the term "vested right" in deciding whether one does or does not have an inherent right to continue to act or use property in a particular manner make it appropriate that an effort should be made to review the more important matters falling within or without the scope of the term "vested right."[19]

§ 369. As to Impairment.—As already noted, the Constitution of the United States does not prohibit all retrospective legislation, but only those state enactments which constitute ex post facto laws or which impair the obligation of contract or violate the guaranties of the Fourteenth Amendment.[20] In case a state Constitution contains additional prohibitions broadly inhibiting the passage of retroactive laws, such provisions, as has already been seen, are generally restricted so as to apply only to enactments affecting or impairing

15 Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, 36 S. Ct. 236, L.R.A.1917D, 414, Ann. Cas. 1917B, 713.

Annotation: 11 A.L.R. p. 518.

For a detailed discussion, see INCOME TAXES [Also 26 R. C. L. p. 142, § 117].

16 See supra, §§ 365 et seq.

17 See supra, § 335.

18 See supra, §§ 268 et seq.

19 See Vol. 12, Subd. XIV.

20 See supra, § 365.

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vested rights.[1] In the application of such prohibitions the inquiry, therefore, may relate to the ascertainment of what are and what are not vested rights.[2] Legislation which impairs vested rights may likewise be invalid as amounting to a taking of property without due process of law.[3] Questions as to the constitutionality of laws affecting or impairing vested rights may therefore be raised in several ways: (1) In inquiries as to whether such laws are prohibited in any degree by the Constitution of the United States; (2) in inquiries as to whether such impairment of vested rights amounts to retrospective legislation prohibited by state Constitutions; and (3) in cases which hinge on the question whether such impairment of vested rights amounts to a violation of constitutional requirements as to due process of law. It has been pointed out that the phrase "vested rights" is nowhere used in the Federal Constitution,[4] and as shown above, prior to the Fourteenth Amendment, the Supreme Court had no power to pronounce an act of a state legislature void, as contrary to the Constitution of the United States, merely because such law divested antecedent vested rights of property.[5] In similar manner state courts have declared that a state Constitution, when it does not conflict with that of the United States, is omnipotent in its disposition and even destruction of private and social rights and that a state may divest vested rights without infringing the paramount law of the land.[6] Nevertheless, statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void.[7] Irrespective of any express prohibition as to the enactment of retrospective laws and, in consequence, laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights[8] and that even if a law is intended simply to change the remedy or procedure, it is void if in fact it impairs vested rights.[9]

[1] See supra, § 366.

[2] See infra, §§ 370 et seq.

[3] See supra, § 367.

[4] Campbell v. Holt, 115 U. S. 628, 29 L. ed. 483, 6 S. Ct. 209.

[5] Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Baltimore & Susquehanna R. Co. v. Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469; Grinder v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694.

In Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025, the court recognized this to be the law prior to the passage of the Fourteenth Amendment.

[6] State v. New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168.

[7] Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Girdner v. Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700.

[8] Davis & McMillan v. Industrial Acci. Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; Teralta Land & W. Co. v. Shaffer, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194; Sears v. Chicago, 247 Ill. 204, 93 N. E. 158, 139 Am. St. Rep. 319, 20 Ann. Cas. 539; Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240; Windsor v. Des Moines, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Re Pell, 171 N. Y. 48, 63 N. E. 789, 57 L.R.A. 540, 89 Am. St. Rep. 791; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; National Bank v. Jones, 18 Okla. 555, 91 P. 191, 12 L.R.A.(N.S.) 310, 11 Ann. Cas. 1041; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715; Danville v. Pace, 25 Gratt. (Va.) 1, 18 Am. Rep. 663; Hall v. Burns, 113 W. Va. 820, 169 S. E. 522, citing R. C. L.

See also Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542, wherein it was said that a retrospective law may be passed by a state legislature provided it does not devest settled rights of property.

Annotation: 41 L. ed. 95.
5 Cal. Jur. p. 748, § 142.

[9] Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 381, 33 S. Ct. 216; Baugher v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694 (dictum); Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459; Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L.R.A. 880, 95 Am. St. Rep. 517; Blakmore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574.

A legislature cannot deprive a party of a vested property right, under pretense of making or changing a rule of evidence. Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 381, 33 S. Ct. 216.

A substantive vested right cannot be impaired under the guise of a change in remedy. Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L.R.A. 314, 108 Am. St. Rep. 459.

b. Definition and Nature of Vested Rights

§ 370. Definition.—The term "vested right" is one exceedingly difficult to define due to its many applications and uses by the courts. The purpose of this section is to define the term in its constitutional sense generally, and not to attempt to give its applications as they exist in various fields of the law. The term appears first to have been used in reference to real estate. It is defined as "an immediate fixed right of present or future enjoyment" and "an immediate right of present enjoyment, or a present fixed right of future enjoyment."[10] Rights are said to be vested in contradistinction to their being contingent or expectant. A right is "vested" when there is an ascertained person with a present right to present or future enjoyment; it is "expectant" when it depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he survives his ancestor and the ancestor dies seised and intestate; and finally, is "contingent" when it depends on the performance of some condition or the happening of some event before some other event or condition happens or is performed.[11] As applied to the vested rights which are secured by constitutional guaranties from infringement or impairment except under special circumstances, the term is not to be restricted to any narrow or technical meaning applicable to these words in the law of real property. The words are used as implying interests which it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice.[12] A vested right may also be defined as the power to perform certain actions or possess certain things lawfully and is substantially a property right.[13] When a right has arisen upon a contract or transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, it has become vested and the repeal of the statute does not affect it or an action for its enforcement.[14] A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws.[15]

[10] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Cusick v. Feldpausch, 259 Mich. 349, 243 N. W. 226, citing R. C. L.

[11] Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Cusick v. Feldpausch, 259 Mich. 349, 243 N. W. 226, citing R. C. L.; McCleery v. Woodmen of World, 136 Or. 407, 299 P. 1004, citing R. C. L.; Re Person, 7 Alaska, 626, citing R. C. L.

Annotation: 41 L. ed. 95.

A right cannot be regarded as vested in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing laws. Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

[12] Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 209; Fee v. Cowdry, 45 Ark. 410, 55 Am. Rep. 560; Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298 (appeal dismissed in 283 U. S. 787, 75 L. ed. 1415, 51 S. Ct. 348) citing R. C. L.

[13] Merchants Bank v. Garrard, 158 Ga. 867, 124 S. E. 715, 38 A.L.R. 102; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

A right is vested when its enjoyment, present or prospective, has become the property of a particular person as a present interest. Arnold & H. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470.

To be "vested" in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. Merchants Bank v. Garrard, 158 Ga. 867, 124 S. E. 715, 38 A.L.R. 102.

[14] Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805.

Annotation: 41 L. ed. 95.

The repeal of a law which is, in its nature, a contract, cannot divest vested rights which have been established under that statute. Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962.

[15] Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Stratton Claimants v. Mor-

The distinction between statutory privileges and vested rights must be borne in mind, for the citizen has no vested rights in statutory privileges and exemptions.[16] The right of exemption from public duties, such as military or jury service, is not a vested right, but rather is a mere gratuity which may be withdrawn at the pleasure of the legislature.[17]

§ 371. Nature and Origin.—Vested rights may be created by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection.[18] The mere fact that the enactment of a statute may have been dictated by public policy does not preclude the acquisition of vested rights thereunder.[19]

The failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it in no way affects or lessens such right.[20] Accordingly, when a claim or right has arisen resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that such a claim falls with the repeal of the statute under which the transaction was had.[1]

The vested right may arise in many different ways. For example, it may be one which has arisen by dedication or by escheat, or it may be one in the nature of a mere easement.[2]

c. General Principles

§ 372. Absence of Vested Rights in Existing Law.—There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate on a particular subject.[3] In no case is there an implied promise on the part of the state to

ris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 15 S. W. 87, 12 L.R.A. 70.

[16] State v. Cantwell, 142 N. C. 604, 55 S. E. 820, 8 L.R.A.(N.S.) 498, 9 Ann. Cas. 141; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

It is a general rule of constitutional law that a person has no vested right in statutory privileges and exemptions. Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251.

[17] State v. Cantwell, 142 N. C. 604, 55 S. E. 820, 8 L.R.A.(N.S.) 498, 9 Ann. Cas. 141.

[18] People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L.R.A. 880, 45 Am. St. Rep. 517; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730.

[19] Furlong v. National Life & Acci. Ins. Co. 185 La. 352, 169 So. 431, 106 A.L.R. 40.

[20] Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. ed. 805; Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L.R.A 880, 95 Am St. Rep. 517; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 335.

A right once vested does not require for its preservation the continued existence of the power by which it was acquired. Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. ed. 234.

[1] Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U.S.) 450, 17 L. ed. 805; Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331.

[2] Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L.R.A. 849, 61 Am. St. Rep. 185; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L.R.A.(N.S.) 241, 133 Am. St. Rep. 276.

[3] Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 42 S. Ct. 124, 27 A.L.R. 375; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 39 S. Ct. 553, 6 A.L.R. 1537; Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, 37 S. Ct. 247, L.R.A. 1917D, 1, Ann. Cas. 1917D, 629; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 S. Ct. 678; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 L.R.A.(N.S.) 44; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 S. Ct. 265, 34 L.R.A. (N.S.) 671; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. (U. S.) 1, 20 L. ed. 272; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470; People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, 148 N. W. 71, L.R.A.1916D, 412; State ex rel. Kansas City v. Trimble, 317 Mo. 1208, 298 S. W. 833, citing R. C. L.; State ex rel. Otto v. Kansas City, 310 Mo. 542, 276 S. W. 389, citing R. C. L.; Thompson v. St. Louis

protect its citizens against incidental injury occasioned by changes in the law.[4] Every citizen in making his arrangements in reliance on the continued existence of laws takes on himself the risk of their being changed, and the state incurs no responsibility in consequence of the change proving injurious to his private interests.[5] A repeal or amendment of a statute, however, cannot have the effect of extinguishing vested rights which have been acquired under the former law.[6]

§ 373. Remedial Legislation.[7]—The state has complete control over the remedies which it offers to suitors in its courts even to the point of making them applicable to rights or equities already in existence.[8] A statute abolishing the distinction between actions at law and in equity and establishing a single form of action violates no constitutional or vested right of suitors.[9] Hence, it has become firmly established that there is no vested right in any particular mode of procedure or remedy[10] and no vested right is destroyed

(Mo.) 253 S. W. 969, citing R. C. L.; writ of error dismissed in 269 U. S. 589, 70 L. ed. 427, 46 S. Ct. 12; J. B. Preston Co. v. Funkhouser, 261 N. Y. 140, 639, 184 N. E. 737, 185 N. E. 772, 87 A.L.R. 459, affirmed in 290 U. S. 163, 78 L. ed. 243, 54 S. Ct. 134; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L.R.A.(N.S.) 1215, Ann. Cas. 1912B, 251; Rochester v. Rochester R. Co. 182 N. Y. 99, 74 N. E. 953, 70 L.R.A. 773, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 S. Ct. 469; Williamson Real Estate Co. v. Sasser, 179 N. C. 497, 103 S. E. 73, citing R. C. L.; Graves v. Howard, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914C, 565; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L.R.A.(N.S.) 694; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755; Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451; Fitzgerald v. Grand Trunk R. Co. 63 Vt. 169, 22 A. 76, 13 L.R.A. 70; Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025.

The liberty of a citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. Middleton v. Texas Power & L. Co. 249 U. S. 152, 63 L. ed. 527, 39 S. Ct. 227.

There can be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which exempts a contract from the effect of subsequent legislation upon its subject matter by competent legislative authority. Harsha v. Detroit, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853.

Stockholders in a corporation have no vested right to an indefinite continuance of all existing laws relating to the corporation for all time. Witt v. People's State Bank, 166 S. C. 1, 164 S. E. 306, 83 A.L.R. 1068.

[4] Stanford v. Coran, 28 Mont. 288, 72 P 655, 98 Am. St. Rep. 566; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755, citing R. C. L.

Citizens have no vested right in the existing general laws of the state, which can preclude their amendment or repeal, and there is no implied promise on the part of a state to protect its citizens against incidental injury occasioned by changes in the law. State v. Hamey, 168 Mo. 167, 65 S. W. 946, 67 S. W. 620, 57 L.R.A. 846.

[5] East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 259, 2 Am. Rep. 82; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755.

[6] Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470.

No one has a vested right in a public law; the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Arnold & M. Co. v. Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470.

[7] As to curative remedial legislation, see infra, § 379.

[8] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 U. S. 151, 76 L. ed. 214, 52 S. Ct. 69; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 S. Ct. 475; A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. Rep. 266; Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 104 N. W. 142, 70 L.R.A. 621; Drake v. Frazier, 105 Neb. 162, 179 N. W. 393, 11 A.L.R. 766; Igoe Bros. v. National Surety Co. 112 N. J. L. 243, 169 A. 841, 96 A.L.R. 1422; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas. 1912B, 156; Spicer v. Benefit Asso. R. E. 142 Or. 574, 21 P. (2d) 187, 90 A.L.R. 517; Templeton v. Linn County, 22 Or. 313, 29 P. 795, 15 L.R.A. 730; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755.

Statutory actions and remedies in some instances may be substituted for previously existing common-law remedies without any impairment of vested rights. Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2d) 404, 85 A.L.R. 451.

[9] Kenny v. McKenzie, 25 S. D. 485, 127 N. W. 597, 49 L.R.A.(N.S.) 782.

[10] Winter v. Barrett, 352 Ill. 441, 186 N. E. 113, 89 A.L.R. 1398; Arnold & M. Co. v.

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when the law restores a remedy which has been lost.[11] While it is true that no one has a vested right in any given mode of procedure, a substantial and efficient remedy must remain or be provided in order that due process of law is not denied by the legislative change.[12] Furthermore, in those states in which there is a constitutional provision guaranteeing to every person a remedy for all injuries done him, the legislature cannot destroy a cause of action which existed at common law and was established in jurisprudence when the state itself came into existence as a sovereignty.[13]

§ 374. Specific Illustrations.—In general, no such thing as a vested right in a rule of evidence is recognized and the rules of evidence may be changed by legislative enactment;[14] and since it is entirely competent for the legislature to alter, enlarge, modify, or confer a remedy for existing legal rights, it may also establish new rules of evidence to be applied in the trial of existing, as well as future, causes of action.[15] Upon the same considerations a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away.[16] Statutes deal-

Industrial Commission, 314 Ill. 251, 145 N. E. 342, 40 A.L.R. 1470; Louisville, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L.R.A. 787; Henley v. Myers, 76 Kan. 723, 93 P. 168, 17 L.R.A.(N.S.) 779, affirmed in 215 U. S. 373, 54 L. ed. 240, 30 S. Ct. 148; Miners' & M. Bank v. Snyder, 100 Md. 57, 59 A. 707, 68 L.R.A. 312, 108 Am. St. Rep. 390; Hanes & Co. v. Wadey, 73 Mich. 178, 41 N. W. 222, 2 L.R.A. 498; Igoe Bros. v. National Surety Co. 112 N. J. L. 243, 169 A. 841, 96 A.L.R. 1422; Blair v. Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L.R.A. 644; Spicer v. Benefit Asso. R. E. 142 Or. 588, 21 P. (2d) 187, 90 A.L.R. 517; Lewis v. Pennsylvania R. Co. 220 Pa. 317, 69 A. 821, 18 L.R.A.(N.S.) 279, 13 Ann. Cas. 1142.

Annotation: 41 L. ed. 96.

No person has a vested right in any particular mode of procedure or remedy; accordingly, a cause must be tried under the rules of procedure existing at the time of the trial. Spicer v. Benefit Asso. R. E. 142 Or. 588, 21 P. (2d) 187, 90 A.L.R. 517.

No one can claim to have a vested right in any particular mode of procedure for the enforcement or defense of his right. Lewis v. Pennsylvania R. Co. 220 Pa. 317, 69 A. 821, 18 L.R.A.(N.S.) 279, 13 Ann. Cas. 1142.

[11] Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 209.

A contract incapable of enforcement for want of a remedy may be aided by legislative action so as to become the ground of a valid action. Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 209.

[12] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214; Oshkosh Waterworks Co. v. Oshkosh, 187 U. S. 437, 47 L. ed. 249, 23 S. Ct. 234; A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 S. Ct. 344; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Hewitt Logging Co. v. Northern P. R. Co. 97 Wash. 597, 166 P. 1153, 3 A.L.R. 198.

Annotation: 41 L. ed. 96.

There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, provided only the essential elements of protection are preserved. A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 S. Ct. 445.

No litigant has a vested right in procedure so long as his right of action is not abolished. Hewitt Logging Co. v. Northern P. R. Co. 97 Wash. 597, 166 P. 1153, 3 A.L.R. 198.

As to due process, see Vol. 12, Subd. XIV.

[13] See supra, § 326.

[14] Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Hall v. Johnson, 87 Or. 21, 169 P. 515, Ann. Cas. 1918E, 49.

For a detailed discussion, see EVIDENCE [Also 10 R. C. L. pp. 863 et seq.].

[15] Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 380, 33 S. Ct. 216; Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 13 S. E. 493, 14 L.R.A. 721; Philip v. Heraty, 147 Mich. 473, 111 N. W. 93, 118 Am. St. Rep. 554; Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A.L.R. 755, citing R. C. L.

A right to have one's controversies determined by the existing rules of evidence is not a vested right, for such rules pertain to the remedies which the state provides for its citizens, and generally in legal contemplation they neither enter into and constitute a part of any contract nor are regarded as being of the essence of any right which a party may seek to enforce. Luria v. United States, 231 U. S. 9, 58 L. ed. 101, 34 S. Ct. 10.

[16] Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231.

The cutting down of the remedy of an abutting owner, dissatisfied with an award for the damage caused by the construction of an elevated viaduct changing the street grade, from a general review in a state court of general jurisdiction of the

ing with bankruptcy matters are, as a general rule, sustained on the ground that they affect the remedy, and not vested rights,[17] although where such legislation substantially impairs vested rights, it violates the Fifth Amendment and is unconstitutional.[18] The Federal Constitution does not give depositors in a bank a vested right to liquidation at the hands of a state official.[19] A party's rights in a judgment, as a general rule, may not be affected by legislative acts passed or which become effective after the entry of the judgment.[20] This rule, however, does not apply to laws which are merely remedial and which only affect matters of procedure or practice.[1] A statutory provision that a judgment shall not be reversed for error in the charge of the court, unless such error is excepted to by bill or on motion for new trial, is not unconstitutional, since it affects no vested right, but merely regulates the remedy.[2] The legislature has the power to modify or repeal the whole of the statute of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is limited by the rule that no law will be allowed so to operate as to disturb or destroy rights already vested.[3] While the matter is discussed more fully in another article, it is well to mention here that defendants charged with crime have no vested rights in matters merely procedural having no vital connection with a real defense upon the merits.[4] Laws of a retroactive nature which provide remedies for the assessment and collection of taxes and which do not impair vested rights are not forbidden by the Federal Constitution.[5] Furthermore, there is no vested right to an injunction against the collection of illegal taxes, and the institution of a suit for that purpose does not create one.[6] A change in the law removing or abolishing the liability of public officers for losses of funds occasioned by the insolvency of the depository is constitutional, since taxpayers have no vested rights in funds in the hands of such officers.[7]

proceedings of the board confirming the award to a review limited to questions of jurisdiction, fraud, and wilful misconduct on the part of the officials composing the board, does not take the property of such owner without due process of law. Crane v. Hahlo, 258 U. S. 142, 66 L. ed. 514, 42 S. Ct. 214.

For a detailed discussion, see APPEAL AND ERROR, Vol. 2, p. 849, § 8.

[17] Wright v. Vinton Mountain Trust Bank, 300 U. S. 440, 81 L. ed. 736, 57 S. Ct. 556, — A.L.R. —; Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403.

Annotation: 88 A.L.R. 257.

A statute which gives certain claims priority in a bankruptcy proceeding is one which affects the remedy. The interests affected are too contingent, too remote, and too insubstantial to demand protection. Re Inland Dredging Corp. (C. C. A. 2d) 61 F. (2d) 765, 88 A.L.R. 254, writ of certiorari denied in 288 U. S. 611, 77 L. ed. 985, 53 S. Ct. 403.

[18] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106, rehearing denied in 296 U. S. 661, 80 L. ed. 471, 56 S. Ct. 82.

For a more detailed discussion, see BANKRUPTCY, Vol. 6, p. 785, §§ 443 et seq.

As to due process, see Vol. 12, Subd. XIV.

[19] Doty v. Love, 295 U. S. 64, 79 L. ed. 1303, 55 S. Ct. 558, 96 A.L.R. 1438.

[20] Boucofski v. Jacobsen, 36 Utah, 165, 104 P. 117, 26 L.R.A.(N.S.) 898.

For a detailed discussion, see JUDGMENTS [Also 15 R. C. L. p. 576, § 9].

[1] See infra, § 379.

[2] Johnson v. State, 42 Tex. Crim. Rep. 87, 58 S. W. 60, 51 L.R.A. 272.

[3] Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379.

For a detailed discussion of the constitutionality of the statute of frauds, see STATUTE OF FRAUDS [Also 25 R. C. L. p. 434, § 3].

[4] Snyder v. Massachusetts, 291 U. S. 97, 78 L. ed. 674, 54 S. Ct. 330, 90 A.L.R. 575; Com. v. Gallo, 275 Mass. 320, 175 N. E. 718, 79 A.L.R. 1380.

For a detailed discussion, see CRIMINAL LAW [Also 8 R. C. L. p. 56, § 7].

[5] Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 S. Ct. 171; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 S. Ct. 475.

A delinquent taxpayer has no vested right in an existing mode of collecting taxes. Henry v. McKay, 164 Wash. 526, 3 P. (2d) 145, 77 A.L.R. 1025.

For a detailed discussion, see TAXATION [Also 26 R. C. L. p. 350, § 307].

[6] Smallwood v. Gallardo, 275 U. S. 56, 72 L. ed. 152, 48 S. Ct. 23.

[7] Schenbeck v. McCrary, 298 U. S. 36, 80 L. ed. 1031, 56 S. Ct. 672.

See PUBLIC FUNDS [Also 22 R. C. L. p. 228, § 6].

§ 375. Divesting Vested Rights by Legislative Fiat.—While there is in the Federal Constitution no express guaranty as to vested rights, such rights are fully protected, as shown above, by the Fourteenth Amendment, which provides that no state shall deprive any person of life, liberty, or property without due process of law,[8] and by decisions thereunder to the effect that private property shall not be taken for public use without just compensation.[9] In view of this restraint or others, such as the prohibition by a state Constitution of the enactment of retrospective laws, the state cannot by a mere act of the legislature take property from one man and vest it in another directly; nor can such property, by the retrospective operation of laws, be indirectly transferred from one to another.[10] Hence, a statute is unconstitutional which in effect, either by legislative fiat or by direct or indirect operation, takes the property of one man and gives it to another.[11] Mere settlement, however, on public lands with the declared intention to obtain a title to them under pre-emption laws does not create such a vested right that Congress may not, by statute, dispose of such property in any way it may see fit.[12] Following this general principle, retroactive declaratory statutes will not be allowed to affect vested rights,[13] and an act of the legislature declaring the interpretation to be placed upon a previous statute will not be allowed to affect transactions or rights of action which accrued prior to the enactment of such statute.[14] There is probably no instance in the history of the American commonwealths of an attempt by a legislature to deprive any citizen of his property for the avowed purpose of giving it to another; but many statutes have been attacked on the ground that they operate to produce that unjust and unlawful result, and some of these attacks have been successful. The statutes in question are those designed to cure defects in judicial sales, sales under execution,

[8] See supra, § 367.

[9] See Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A.(N.S.) 832.
For a detailed discussion, see EMINENT DOMAIN [Also 10 R. C. L. p. 6, § 2].

[10] Ochoa v. Hermandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 S. Ct. 1033; Webster v. Cooper, 14 How. (U. S.) 488, 14 L. ed. 510; Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp. 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Chicago v. Cohn, 326 Ill. 372, 158 N. E. 118, 55 A.L.R. 196; People v. Chicago, M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610; Proprietors of Kennebec Purchase v. Laboree, 2 Me. 275, 11 Am. Dec. 79; Booth v. Hairston, 193 N. C. 278, 195 N. C. 8, 136 S. E. 879, 141 S. E. 480, 57 A.L.R. 1186; Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L.R.A.(N.S.) 487.

Taking away one man's property and giving it to another without due process of law is beyond the sphere of the legislative authority of both states and nation. Osborn v. Nicholson, 13 Wall. (U. S.) 654, 20 L. ed. 689.

A legislative act which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law. Gilman v. Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L.R.A. 304, 26 Am. St. Rep. 464.

The legislature cannot, in view of constitutional limitations, take any portion of a vested property right from one person and invest another with it. Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp. 202 Cal. 56, 259 P. 444, 56 A.L.R. 264.

[11] Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Ebersole v. Goodman, 7 Pa. D. & C. 605, citing R. C. L.; Kenny v. McKenzie, 23 S. D. 111, 120 N. W. 781, 49 L.R.A.(N.S.) 775; Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182, 49 L.R.A.(N.S.) 487.
Annotation: 10 Am. Dec. 134.

[12] Yosemite Valley Case (Hutchings v. Low) 15 Wall. (U. S.) 77, 21 L. ed. 82; Frisbie v. Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668.

When all the preliminary acts prescribed by the pre-emption laws, including the payment of the price of the land, have been performed by the settler, he, for the first time, acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. Frisbie v. Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668.
See PUBLIC LANDS [Also 22 R. C. L. pp. 255 et seq.].

[13] Haley v. Philadelphia, 68 Pa. 45, 8 Am. Rep. 153.
Annotation: 41 L. ed. 96.

[14] Baker v. Clowser, 158 Iowa, 156, 138 N. W. 837, 43 L.R.A.(N.S.) 1056; Greenough v. Greenough, 11 Pa. 489, 51 Am. Dec. 567.

The legislature cannot, by the device of construing a statute, alter its meaning so as to affect vested rights. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584.
Annotation: 41 L. ed. 96.

tax sales, mortgage foreclosures, and the like. Such sales depend, for their validity, on the existence of certain facts and the adoption of certain procedure, in the absence of which the sale is void and therefore cannot operate to divest the owner's title to the property sold. Hence, a statute which declares that such a void sale shall be valid is unconstitutional as an arbitrary taking of the property of one citizen and giving it to another.[15]

§ 376. Moral Obligations as Affecting Vested Rights.—While in general a statute, operating upon facts existing at the time of its passage, which attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is unconstitutional;[16] where a moral obligation exists, the legislature may give it legal effect by a retroactive statute.[17] It is axiomatic that no man has a vested right to do wrong.[18] This principle may be applied in some instances in order to test the validity of retroactive legislation. Due to the verity of this maxim, defects in a deed or acknowledgment, of which it would be unjust for one to take advantage, may be cured by retroactive legislation without violating the state or Federal Constitutions.[19] On the same theory, an alien has no constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced on the court, without which the certificate of citizenship could not and would not have been issued.[20] This maxim has also been referred to in upholding the general power of the state to call a liability into being where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seems small.[1] The most important class of cases in which this principle is applied consists of those involving the right of the legislature to impose on a municipal corporation legal liability for matters as to which formerly there was merely a moral obligation.[2] In this connection it has been said that a prohibition in

[15] Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533; McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584; Fuller v. Hager, 47 Or. 242, 83 P. 782, 114 Am. St. Rep. 916; Menges v. Dentler, 33 Pa. 495, 75 Am. Dec. 616; Kenny v. McKenzie, 23 S. D. 111, 120 N. W. 781, 49 L.R.A.(N.S.) 775.
Annotation: 75 Am. Dec. 621.

[16] See supra, § 365.

[17] New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521; Lycoming County v. Union County, 15 Pa. 166, 53 Am. Dec. 575.
Annotation: 41 L. ed. 96.

[18] Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 S. Ct. 705; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 S. Ct. 763; Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Freeborn v. Smith, 2 Wall. (U. S.) 160, 17 L. ed. 922; Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 380, 33 S. Ct. 216; Evans-Snider-Buel Co. v. McFadden (C. C. A. 8th) 105 F. 293, 58 L.R.A. 900, affirmed in 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Baugher v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Danforth v. Groton Water Co. 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495; Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13; Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584; People's Loan & Exch. Bank v. Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.
Annotation: 16 Am. Dec. 519; 52 Am. Dec. 703.

There is no vested and inalienable right of property in that which is a nuisance. State v. Olson, 26 N. D. 304, 144 N. W. 661, L.R.A.1918B, 975, writ of error dismissed in 245 U. S. 676, 62 L. ed. 542, 38 S. Ct. 13.

[19] Webb v. Den, 17 How. (U. S.) 576, 15 L. ed. 35; Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584.
For a detailed discussion, see ACKNOWLEDGMENTS, Vol. 1, p. 370, §§ 131 et seq.].

[20] Johannessen v. United States, 225 U. S. 227, 56 L. ed. 1066, 32 S. Ct. 613.
For a detailed discussion, see ALIENS, Vol. 2, p. 589, § 242.

[1] Danforth v. Groton Water Co. 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495.

[2] New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521; Pritchard v. Savannah Street & R. Resort R. Co, 87 Ga. 294, 13 S. E.

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a state Constitution against retroactive legislation which would affect vested rights is intended for the protection of individuals and does not apply to legislation recognizing and affirming a moral obligation of a subordinate branch of the state with respect to a past transaction.[3] The recognition of moral obligations has been extended to the state itself, statutes imposing liability on the state being sustained.[4] Another instance of moral obligation as affecting vested rights is involved in the effect of the repeal of a statute of limitations. If the repeal is to operate retroactively, it would revive debts theretofore barred, and this presents a question of deprivation of vested rights as to which there is a conflict of authority.[5]

3. Rights of Litigation

§ 377. Rights of Action.—A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, the legislature may not take it away.[6] To permit the legislature to destroy vested rights of action is in violation of the due process clause, and since the enactment of the Fourteenth Amendment, such legislation is invalid thereunder,[7] although prior to the passage of this amendment there was no Federal constitutional limitation on the state legislatures or Congress preventing the destruction of vested rights of action.[8] Of course, as shown above, the appellant has no property in any particular remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure.[9] Acting under this broad general principle, some jurisdictions hold that since it is the duty of Congress to indemnify out of the public treasury any person who has been compelled to pay damages for an act performed by him in good faith under military orders of the President of the United States, Congress cannot by a retrospective law deny all redress to a person whose property or liberty has been taken illegally under such a military order.[10] Other jurisdictions have held differently. For example, the court has upheld the validity of a provision in a state Constitution which provides that no person should be prosecuted in any civil or criminal proceeding for or on account of any act done or executed by him during the Civil War by virtue of military authority vested

493, 14 L.R.A. 721; Felix v. Wallace County, 62 Kan. 832, 62 P. 667, 84 Am. St. Rep. 424; Re Heinemann, 201 Wis. 484, 230 N. W. 698, citing R. C. L.

For a detailed discussion, see Municipal Corporations [Also 19 R. C. L. p. 724, § 32].

[3] New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521; Cullman County v. Blount County, 160 Ala. 319, 49 So. 315, 18 Ann. Cas. 322.

[4] Fairfield v. Huntington, 23 Ariz. 528, 205 P. 814, 22 A.L.R. 1438.

For a detailed discussion, see States, Territories, and Dependencies [Also 25 R. C. L. pp. 402 et seq.]; Taxation [Also 26 R. C. L. pp. 64 et seq.].

[5] See Limitation of Actions [Also 17 R. C. L. pp. 682 et seq.].

[6] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Graham v. Goodcell, 282 U. S. 409, 75 L. ed. 415, 51 S. Ct. 186; Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 S. Ct. 102; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L.R.A. 468, 92 Am. St. Rep. 293; Ft. Worth v Morrow (Tex. Civ. App.) 284 S. W. 275, citing R. C. L.; Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L.R.A. 306, 81 Am. St. Rep. 715.

[7] Gibbes v. Zimmerman, 290 U. S. 326, 78 L. ed. 342, 54 S. Ct. 140; Graham v. Goodcell, 282 U. S. 409, 75 L. ed. 415, 51 S. Ct. 186; Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325.

[8] Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 395, 13 L. ed. 469; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. ed. 458.

Annotation: 28 L. ed. 331.

The legislature may pass a statute which shall operate retrospectively and sweep away any right of action which arose from a tort. Annotation: 28 L. ed. 331.

[9] See supra, § 372.

[10] Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159.

in him by the United States or a state to do such act or in pursuance of orders received by him from any party vested with such authority.[11] A cause of action for wrongful death depends solely upon statute and is not a vested right protected by the state or Federal Constitution, and a repeal of the statute operates to destroy such cause of action,[12] although there is authority to the contrary, particularly in those jurisdictions where there is a constitutional inhibition against retrospective laws.[13] Under the general rule, a vested right of action against a railroad company for the negligent killing of a soldier cannot be taken away by a government circular requiring such claims to be settled by the Bureau of War Risk Insurance.[14] The same principle has been applied to a common-law remedy for negligence resulting in injuries, and such means of redress cannot be taken away without providing some other efficient remedy.[15]

§ 378. Rights in Defenses.—It is frequently difficult to determine exactly what amounts to a vested right in a defense.[16] It is generally conceded that no one has a vested right to a defense based on mere informalities,[17] especially where such informalities consist of matters which originally could have been dispensed with by the legislature, although the legislature has no power, by a subsequent curative statute, to remedy a jurisdictional defect or one which obviously goes to the substance of a vested right.[18] Illustrations abound of defenses which are clearly substantial and of which a party cannot be deprived. A man who has a demand which has been actually satisfied clearly cannot be required to meet it again by having it revived against him.[19] Likewise, one against whom a claim has been barred by the statute of limitations is, by the weight of authority, immune from any restoration of the claim which would deny him the right to plead the statute as a defense. There is respectable authority for the contrary view, however.[20] This is particularly true in so far as title to real or personal property is concerned. The fall of the bar of the statute of limitations creates a vested right to this defense which cannot be impaired by the legislature.[21] While it has been said that there is no vested right in a mere defense to a personal demand,[1] the general rule may conveniently be summarized by stating that a vested right to an existing defense is protected in like manner as a right of action, with the ex-

[11] Drehman v. Stifel, 41 Mo. 184, 97 Am. Dec. 268.

[12] Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327.

Annotation: 77 A.L.R. 1338, 1345.

[13] Annotation: 77 A.L.R. 1338, 1345.

A statute giving the widow or next of kin a right to recover for the death of the husband by a wrongful act gives a vested right. Cetofonte v. Camden Coke Co. 78 N. J. L. 662, 75 A. 913, 27 L.R.A. (N.S.) 1058.

For a detailed discussion, see Death [Also 8 R. C. L. p. 735, § 31].

[14] Bryson v. Hines (C. C. A. 4th) 268 F. 290, 11 A.L.R. 1438.

Annotation: 11 A.L.R. 1443, s. 13 A.L.R. 1028.

[15] West v. Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391; Mattson v. Astoria, 39 Or. 577, 65 P. 1066, 87 Am. St. Rep. 687.

Annotation: 36 A.L.R. 1400.

[16] Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 104 N. W. 142, 70 L.R.A. 621; Girdner v. Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700.

[17] Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 S. Ct. 102; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L.R.A. 468, 92 Am. St. Rep. 293.

Annotation: 92 Am. St. Rep. 300.

[18] Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182.

See infra, § 379.

[19] Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78, 67 A.L.R. 287; Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 104 N. W. 142, 70 L.R.A. 621; Girdner v. Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700.

Annotation: 36 A.L.R. 1317.

[20] Annotation: 36 A.L.R. 1317.

See Limitation of Actions [Also 17 R. C. L. p. 674, §§ 15 et seq.].

[21] Annotation: 36 A.L.R. 1317.

For a detailed discussion, see Adverse Possession, Vol. 1, p. 797, § 13; Limitation of Actions [Also 17 R. C. L. p. 674, §§ 15 et seq.].

[1] McEldowney v. Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L.R.A. 609.

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ception only of those defenses which are based on informalities not affecting substantial rights.[2] On the other hand, a right of defense to a claim arising from res judicata is a vested right of which one cannot be deprived without a violation of constitutional guaranties.[3] A party has no vested rights in the defense of usury and the repeal of a statute which permits the defense of usury acts retrospectively and does away with the defense in actions on contracts already made. It is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract.[4]

4. Curative and Remedial Legislation

§ 379. Generally.[5]—A curative statute is necessarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, except such as are jurisdictional or affect substantive rights,[6] and also to cure or to give effect to contracts between parties which might otherwise be invalid for failure to comply with technical legal requirements.[7] There are some limits, however, to the power of the legislature in this regard. A receipt which is void for uncertainty as a contract for the sale of land cannot be made valid by a subsequent statute allowing parol testimony to identify the land.[8]

2 Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 S. Ct. 102; Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 So. 274, 20 L.R.A.(N.S.) 848, 131 Am. St. Rep. 20, 16 Ann. Cas. 690; Board of Education v. Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L.R.A. 70, 46 Am. St. Rep. 348; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 62 N. E. 488, 56 L.R.A. 468, 92 Am. St. Rep. 293; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Danforth v. Groton Water Co. 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495.

Annotation: 92 Am. St. Rep. 300.

3 People ex rel. Endicott v. Prather, 343 Ill. 443, 175 N. E. 658, 74 A.L.R. 874.

4 Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 S. Ct. 309; Ewell v. Daggs, 108 U. S. 143, 27 L. ed. 682, 2 S. Ct. 408.

For a detailed discussion, see Usury [Also 27 R. C. L. p. 206, § 6].

5 As to remedial legislation generally, see supra, § 373.

6 Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325; Thompson v. Perrine, 103 U. S. 806, 26 L. ed. 612; Thomson v. Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784, citing R. C. L.; Mercnants Nat. Bank v. Delaware School Twp. 185 Ind. 658, 114 N. E. 450, citing R. C. L.; Walpole v. Elliott, 18 Ind. 258, 81 Am. Dec. 358; McSurely v. McGraw, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; Brownell v. Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L.R.A. 685; Booth v. Hairston, 193 N. C. 278, 195 N. C. 8, 136 S. E. 879, 141 S. E. 480, 57 A.L.R. 1186; Swartz v. Carlisle, 237 Pa. 473, 85 A. 847, Ann. Cas. 1914B, 458; Com. v. Fye, 9 Pa. D. & C. 32, citing R. C. L. See also McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561, to the effect that a curative statute undertaking to cure jurisdictional defects is an interference with vested rights and therefore unconstitutional.

The legislature by curative act cannot destroy vested rights and make a valid proceeding out of one previously declared void. People ex rel. Endicott v. Prather, 343 Ill. 443, 175 N. E. 658, 74 A.L.R. 874.

A deed of gift which has become void under the statute because of the failure to register it in time cannot be validated by retroactive legislation. Booth v. Hairston, 193 N. C. 278, 195 N. C. 8, 136 S. E. 879, 141 S. E. 480, 57 A.L.R. 1186.

The legislature may, unless expressly forbidden, cure by a retrospective statute defects in legal proceedings which are in their nature irregularities only; but where there was originally a failure or jurisdiction, no subsequent law can confer it. Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533.

See Statutes [Also 25 R. C. L. pp. 790 et seq.].

7 New Orleans v. Clark, 95 U. S. 644, 24 L. ed. 521; Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784, citing R. C. L.; Harris v. Rutledge, 19 Iowa, 388, 87 Am. Dec. 441; Meigs v. Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322.

Annotation: 41 L. ed. 97; 100 Am. St. Rep. 233.

Statutes which validate contracts otherwise invalid are sustained when they go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality or in consequence of some ingredient in the contract forbidden by law. Smoot v. People's Perpetual Loan & Bldg. Asso. 95 Va. 686, 29 S. E. 746, 41 L.R.A. 589.

As to curative laws affecting contracts, see Vol. 12, Subd. XI.

8 Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379.

There is a division of authority as to whether the legislature may by curative statute relieve a contract from the imputation of illegality.[9]

Although a retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void,[10] this doctrine does not apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, add to the means of enforcing existing obligations. This type of statute is valid when clearly just and reasonable and conducive to the general welfare, even though it might operate in a degree upon existing rights;[11] and when passed after the commencement of an action disputing the legality of certain proceedings cured by the passage of such act, it may be urged as a defense to such action.[12] It may be laid down as a broad general rule that a curative statute remedying defects in a private instrument purporting to convey title or create an interest in real or personal property is, although retroactive, constitutional, provided it does not impair vested rights or interfere with the rights of innocent third persons.[13] A marked conflict of opinion has appeared in the decisions as to the power of a legislature to enact a curative statute which applies to a controversy in which a final judgment has been entered by a court of competent jurisdiction. In a majority of the cases, however, the legislature has been held to have the power to enact a curative

As to the obligation of contracts generally, see Vol. 12, Subd. XI.

9 **Where the legislature relieves a contract** from the imputation of illegality, neither of the parties to the contract can insist on this objection. White Water Valley Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154.

For a detailed discussion, see Contracts [Also 6 R. C. L. p. 706, § 112].

10 Titus v. Titus, 96 Colo. 191, 41 P. (2d) 244, citing R. C. L.; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784, citing R. C. L.; Ross v. Worthington, 11 Minn. 438, Gil. 323, 88 Am. Dec. 95.

See supra, §§ 365 et seq.

11 Hill v. Merchants' Mut. Ins. Co. 134 U. S. 515, 33 L. ed. 994, 10 S. Ct. 589; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. ed. 423; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. ed. 357; Massingill v. Downs, 7 How. (U. S.) 760, 12 L. ed. 903; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Davis & McMillan v. Industrial Acci. Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; Titus v. Titus, 96 Colo. 191, 41 P. (2d) 244, citing R. C. L.; People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784, citing R. C. L.; Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Shields v. Clifton Hill Land Co. 94 Tenn. 123, 28 S. W. 668, 26 L.R.A. 509, 45 Am. St. Rep. 700; Boggess v. Buxton, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289. See Sampeyreac v. United States, 7 Pet. (U. S.) 222, 8 L. ed. 665.

A statute which abolishes the right to execute against the person of a stockholder for the debt of the corporation and substitutes a new remedy by action of debt against him on a judgment obtained against the corporation is valid even as applied to debts contracted by the corporation before its enactment, since it does not annul the liability, but only modifies the form of remedy and the rules of evidence. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 S. Ct. 757.

A party has no vested right in a remedy under an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise. Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. (U. S.) 1, 20 L. ed. 272.

12 Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 33 S. Ct. 585; Windsor v. Des Moines, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280.

13 Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Downs v. Blount (C. C. A. 5th) 170 F. 15, 31 L.R.A.(N.S.) 1076, writ of certiorari denied in 226 U. S. 609, 57 L. ed. 380, 33 S. Ct. 216; Summer v. Mitchell, 29 Fla. 179, 10 So. 562, 14 L.R.A. 815, 30 Am. St. Rep. 106; Steger v. Traveling Men's Bldg. & L. Asso. 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225; Eckles v. Wood, 143 Ky. 451, 136 S. W. 907, 34 L.R.A.(N.S.) 832; Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Wistar v. Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241; Meighen v. Strong, 6 Minn. 177, Gil. 111, 80 Am. Dec. 441; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, 36 L.R.A. 226; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Tate v. Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546.

Annotation: 57 A.L.R. 1197.

For a detailed discussion, see Deeds [Also 8 R. C. L. p. 936, § 13].

statute applicable to such a controversy, although the statute renders ineffective the final judgment.[14]

§ 380. Validation of Prior Unconstitutional Statute.—While there are a large number of cases passing upon the constitutionality or validity of statutes curative of defective transactions between private persons and defective proceedings or acts of public officials, comparatively few cases have passed upon the precise question as to the constitutional validity of statutes purporting to cure prior unconstitutional statutes.[15] There is, however, considerable authority on the closely related question as to the validity of statutes curative of proceedings had, acts done, and obligations incurred, particularly by public officials or governmental agencies under color of authority derived from unconstitutional statutes. While there is some conflict as to the validity of such statutes, the majority of the courts have upheld their constitutionality where the acts or proceedings they purported to cure were of such nature as to fall within the power of the legislature to authorize in the first instance. Such statutes do not, by indirection, attempt to validate prior unconstitutional statutes.[16] In a few cases, however, the courts seemed to have denied to the legislature the right to validate, by curative statutes, acts done or proceedings had under a prior unconstitutional statute.[17] Notwithstanding the holding of the majority of the cases that acts done and proceedings had under a prior unconstitutional statute can be validated by a subsequent curative statute, if they are of such character as to fall within the power of the lawmaking body to legislate upon in the first instance, the cases are fairly consistent in their holding that the legislature is devoid of any power to validate by a subsequent curative act a prior unconstitutional statute and, a fortiori, thereby to disturb intervening private rights.[18] As a matter of fact, in some of the cases which have held that acts done under a prior unconstitutional statute may be validated by a subsequent curative statute, the decision is expressly put on the ground that the curative statute therein involved did not purport to validate the prior unconstitutional statute, but merely acts done thereunder.[19] There is also a split of authority as to whether a void statute may be validated by a subsequent constitutional amendment, the apparent weight of authority supporting the view that such a statute may be given effect by a subsequent constitutional amendment.[20] On the other hand, there is considerable authority to the effect that such a statute is wholly void and is not validated by a subsequent amendment of the Constitution conferring authority upon the legislature to enact such a law.[1]

[14] Annotation: 25 A.L.R. 1136.

As to whether such legislation is a valid exercise of the legislative function, see supra, § 212.

For a detailed discussion of the impairment of vested rights in judgments, see JUDGMENTS; STATUTES [Also 25 R. C. L. p. 790, § 37].

[15] Annotation: 70 A.L.R. 1436; 60 L.R.A. 564.

[16] People ex rel. Fitzgerald v. Stitt, 280 Ill. 553, 117 N. E. 784, citing R. C. L.; Ross v. Wright County, 128 Iowa, 427, 104 N. W. 506, 1 L.R.A.(N.S.) 431.

Annotation: 70 A.L.R. 1437.

[17] People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.

Annotation: 70 A.L.R. 1437; 1 L.R.A.(N.S.) 431.

In People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677, the court held that the legislature could not, by a subsequent curative statute, legalize an assessment made under a statute which failed to comply with the constitutional requirements of equality and uniformity in taxation.

[18] Preveslin v. Derby & A. Developing Co. 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426.

Annotation: 70 A.L.R. 1438.

An unconstitutional act can under no circumstances be validated by the legislature. State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L.R.A 777.

[19] Annotation: 70 A.L.R. 1439.

[20] Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77.

Annotation: 38 L.R.A.(N.S.) 77.

[1] Seneca Min. Co. v. Ozmun (Seneca Min. Co. v. Secretary of State) 82 Mich. 573, 47 N. W. 25, 9 L.R.A. 770; Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128; State ex rel. Stevenson v. Tufly, 20 Nev. 427, 22 P. 1054, 19 Am. St. Rep. 374.

Annotation: 38 L.R.A.(N.S,) 78.

[2] Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 33 S. Ct. 585; Anderson v. Santa Anna Twp. 116 U. S. 356, 29 L. ed. 633, 6 S. Ct. 413 (dictum); Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Gordon v. San Diego, 101 Cal. 522, 36 P. 18, 40 Am. St. Rep. 73; Bowne v. Ide, 109 Conn. 307, 147 A. 4, 66 A.L.R. 1036; Middleton v. St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227; Richman v. Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L.R.A. 445, 14 Am. St. Rep. 308; McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; Wistar v. Foster, 46 Minn. 484, 49 N. W. 247, 24 Am. St. Rep. 241; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Vaught v. Williams, 177 N. C. 77, 97 S. E. 737, citing R. C. L.; Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272, 9 L.R.A.(N.S.) 1145; Lowe v. Harris, 112 N. C. 472, 17 S. E. 539, 22 L.R.A. 379; Ayers v. Lund, 49 Or. 303, 89 P. 806, 124 Am. St. Rep. 1046; Fuller v. Hager, 47 Or. 242, 83 P. 782, 114 Am. St. Rep. 916; Swartz v. Carlisle, 237 Pa. 473, 85 A. 847, Ann. Cas. 1914B, 458; Bleakney v. Farmers & M. Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635; Re Christiansen, 17 Utah, 412, 53 P. 1003, 41 L.R.A. 504, 70 Am. St. Rep. 794.

Annotation: 89 Am. St. Rep. 233, 114 Am. St. Rep. 919.

Acts validating probates and curing defects in other instruments which would have made them inoperative have, as between the parties, been frequently sustained. Vaught v. Williams, 177 N. C. 77, 97 S. E. 737, citing R. C. L.

[3] McFaddin v. Evans-Snider-Buel Co. 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Randall v. Kreiger, 23 Wall. (U. S.) 137, 23 L. ed. 124; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. ed. 876; Bowne v. Ide, 109 Conn. 307, 147 A. 4, 66 A.L.R. 1036.

For a detailed discussion, see DEEDS [Also 8 R. C. L. p. 936].

[4] Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435; Bolles v. Brimfield, 120 U. S. 759, 30 L. ed. 786, 7 S. Ct. 736; Anderson v. Santa Anna, 116 U. S. 356, 29 L. ed. 633, 6 S. Ct. 413; Middleton v. St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227; Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A.(N.S.) 534; Com. v. Frye, 9 Pa. D. & C. 32, citing R. C. L.

A curative act providing that the action of all cities that have adopted the commission form of government at an election by popular vote in pursuance of a statute providing a scheme therefor shall be, after the passage of such curative act, ratified and legalized regardless of any irregularities that may have occurred in such election, legalizes all city elections previously held for such purpose at which a majority of the votes cast were in favor of such proposition. Cole v. Dorr, 80 Kan. 251, 101 P. 1016, 22 L.R.A.(N.S.) 534.

[5] Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435; Phillip Wagner v. Leser, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 33 S. Ct. 585; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742, 11 Ann. Cas. 688; Bolles v. Brimfield, 120 U. S. 759, 30 L. ed. 786, 7 S. Ct. 736; Stockdale v. Atlantic Ins. Co. 20 Wall. (U. S.) 323, 22 L. ed. 348; Smith Bros. v. Williams, 100 Fla. 642, 126 So. 367, citing R. C. L.; Steger v. Traveling Men's Bldg. & L. Asso. 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197; Durrett v. Davidson, 122 Ky. 851, 93 S. W. 25, 8 L.R.A.(N.S.) 546; Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773, citing R. C. L.; Com. v. Frye, 9 Pa. D. & C. 32, citing R. C. L.; Miller v. Henry, 62 Or. 4, 124 P. 197, 41 L.R.A.(N.S.) 97.

A legislature, in the absence of constitutional restriction, can by subsequent ratification make that legal which was originally without legal sanction, but which it might in the first instance have authorized. Bolles v. Brimfield, 120 U. S. 759, 30 L. ed. 786, 7 S. Ct. 736.

The power which can give authority to act can ratify any act that is performed,

§ 381. Irregularities as to Dispensable Matters.—The rule with respect to statutes curing defects in legal proceedings, amounting to mere irregularities, not extending to matters of jurisdiction, and in the absence of constitutional limitations, is that if the thing wanting or not done and constituting the defect in the proceeding is something the necessity for which the legislature might have dispensed with by prior statute, the legislature has the power to dispense with it by subsequent statute; and if the irregularity consists in doing some act or in the method of doing it, which the legislature might have made immaterial by prior law, it may be made immaterial by a subsequent law.[2] Accordingly, the legislature may by a curative act remedy and give validity to past deeds of land which were ineffectual before, provided, of course, vested rights are not disturbed.[3] Likewise, the legislature may, by retroactive statutes, legalize the unauthorized acts and proceedings of subordinate municipal agencies where such acts and proceedings might have been previously authorized by the legislature,[4] and it may ratify and confirm any act which it might lawfully have authorized in the first instance where the defect arises out of the neglect of some legal formality.[5] This power is necessary

that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration.[6] Generally, if the legislature possesses power to authorize an act to be done, it can, by a retrospective act, cure any evils which flow from an irregular execution of that power.[7] The power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations.[8] Accordingly, the validation by the legislature of a consolidated school district after it has been declared void by the courts does not, if no question of special damages or costs is involved, interfere with any private constitutional right of residents of the district.[9] Likewise, the legislature having the right to authorize a municipal corporation to issue bonds in aid of a railroad with or without a popular vote may cure, by a retrospective act, irregularities in the exercise of the power conferred.[10] On the other hand, the legislature has no power, by a remedial statute, to legalize defective proceedings under a former statute where it has no present authority to authorize like proceedings;[11] nor has it the power, by a subsequent curative statute, to remedy a jurisdictional defect[12] or one which goes to the substance of a vested right.[13]

§ 382. Effect on Pending Actions.—As a general rule, where there is no direct constitutional prohibition, the legislative branch of government, whether Federal or state, may pass retrospective laws, such as, in their operation, may affect suits pending and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. Such acts are of a remedial character and are the peculiar subjects of legislation.[14] The position has been taken, however, in some jurisdictions that when an action is once commenced, jurisdiction is purely a judicial question, and it is unconstitutional, under the doctrine of the separation of the powers of government, for the legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the court.[15] The legislature has no power to validate a judicial sale of real estate which is void for want of jurisdiction in the court to make it, at least not without making provision for compensating the owners of the property.[16] It is not within the power of the legislature to cure by retroactive legislation the defect in foreclosure proceedings, arising from the failure to publish the notice of sale for the full period prescribed by the statute, and thus validate the void proceedings.[17] Where, of course, a legislative act in reference to pending litigation impairs vested rights, it cannot be upheld.[18] Another expression supporting the right of the legislature to legislate concerning pending matters in litigation is that the force or validity of a curative statute enacted subsequently to the institution of a suit based upon defects and irregularities intended to be cured by such statute, but prior to the judgment in such action, is not affected by such suit.[19] Curative acts may apply to pending proceedings, and while the legislature cannot annul or set aside the judgment of a court, it may remove a defect on which the judgment proceeded.[20] One method by which a pending suit is sometimes affected is the repeal of the statute under which it was brought. It is clear that after such repeal no judgment can be rendered in a pending suit,[1] for a case must be determined on the law as it stands at the time judgment is rendered, and the theory is that until the final decree is passed there is no vested right to be disturbed.[2] It is true that the private rights of parties, which have been

and legislative recognition of an act validates the act, although it may not have had full prior legal authority. Street v. United States, 133 U. S. 299, 33 L. ed. 631, 10 S. Ct. 309.

A legislature may by a retroactive statute, cure or ratify any defect which it might have in the first instance authorized, unless prohibited by some constitutional or organic provision. Guthrie v. Territory, 1 Okla. 188, 31 P. 190, 21 L.R.A. 841, overruled on another point in Guthrie v. New Vienna Bank, 4 Okla. 194, 38 P. 4.

6 Charlotte Harbor & N. R. Co. v. Welles, 260 U. S. 8, 67 L. ed. 100, 43 S. Ct. 3.

7 Street v. United States, 133 U. S. 299, 33 L. ed. 631, 10 S. Ct. 309; Thompson v. Perrine, 103 U. S. 806, 26 L. ed. 612; Thomson v. Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L.R.A.(N.S.) 77; Steger v. Traveling Men's Bldg. & L. Asso. 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225; Board of Education v. Johnston County, 183 N. C. 300, 111 S. E. 531, citing R. C. L.; Com. v. Fye, 9 Pa. D. & C. 32.

8 United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742, 11 Ann. Cas. 688.

9 Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435.

10 Otoe County v. Baldwin, 111 U. S. 1, 28 L. ed. 331, 4 S. Ct. 265; Thomson v. Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177.

11 "The general and established proposition is that what the legislature could have authorized it can ratify, if it can authorize at the time of ratification." Wagner v. Leser, 239 U. S. 207, 60 L. ed. 230, 36 S. Ct. 66; United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742, 11 Ann. Cas. 688; Stockdale v. Atlantic Ins. Co. 20 Wall. (U. S.) 323, 22 L. ed. 348; Kimball v. Rosendale, 42 Wis. 407, 24 Am. Rep. 421.

Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all, for whatever the legislature could not have authorized originally, it cannot confirm. Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 S. Ct. 20.

12 Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561.

The legislature has the power to validate by subsequent legislation acts done in assumed execution of statutory authority which has not been strictly followed where the subsequent legislation does not extend to matters of jurisdiction. Brownell v. Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L.R.A. 685.

Where a proceeding of any kind is void, with the exception of a judicial proceeding void for want of jurisdiction, it is nevertheless within the power of the legislature to validate such proceeding by retroactive legislation, if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584.

See supra, § 379.

13 Mills v. Geer, 111 Ga. 275, 36 S. E. 673, 52 L.R.A. 934; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L.R.A. 689, 70 Am. St. Rep. 197; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182.

14 United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742; McFaddin v. Evans-Snider-Buel Co. 185 U. S. 505, 46 L. ed. 1012, 22 S. Ct. 758; Freeborn v. Smith, 2 Wall. (U. S.) 160, 17 L. ed. 922; Sampeyreac v. United States, 7 Pet. (U. S.) 222, 8 L. ed. 665; Windsor v. Des Moines, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280; Schenley v. Com. 36 Pa. 29, 78 Am. Dec. 359; Rising Star v. Dill (Tex. Civ. App.) 259 S. W. 652 (affirmed in (Tex.) 269 S. W. 769) citing R. C. L.

Annotation: 76 Am. Dec. 529.

A retrospective law is not void as to a cause of action existing before its passage, so far as it applies to the remedy, and does not affect the right. Sampeyreac v. United States, 7 Pet. (U. S.) 222, 8 L. ed. 665.

The constitutional prohibition of the passage of retroactive laws refers only to retroactive laws that injuriously affect some substantial or vested right, and does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right. Mills v. Geer, 111 Ga. 275, 36 S. E. 673, 52 L.R.A. 934.

15 McSurely v. McGrew, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; Dupy v. Wickwire, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.

Annotation: 6 Am. Dec. 730.

See supra, §§ 208 et seq.

16 Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533.

17 Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L.R.A. 532, 57 Am. St. Rep. 584.

18 Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325; Officers v. Young, 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268.

The existing right of a vessel owner to recover back tolls unlawfully collected from him for passage through the locks of a canal cannot, consistently with the Federal Constitution, be taken away by a state statute thereafter enacted, purporting to validate such collection. Forbes Pioneer Boat Line v. Everglades Drainage Dist. 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325.

The dismissal of an appeal for failure to comply with a mandatory statute as to payment of the register's fee for his return confers a vested right which cannot be impaired by a subsequent statute permitting the reinstatement of appeals within a specified time upon proof that the fee has been paid in the interim. Lohrstorfer v. Lohrstorfer, 140 Mich. 551, 104 N. W. 142, 70 L.R.A. 621.

19 Middleton v. St. Augustine, 42 Fla. 287, 29 So. 421, 89 Am. St. Rep. 227.

Annotation: 89 Am. St. Rep. 233.

20 Chicago, R. I. & P. R. Co. v. Austin, 63 Okla. 169, 163 P. 517, L.R.A.1917D, 666.

1 Ex parte McCardle, 7 Wall. (U. S.) 506, 19 L. ed. 264.

As to the effect of the repeal of a statute, see STATUTES [Also 25 R. C. L. pp. 932 et seq.].

2 People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329, citing R. C. L.; Windsor v. Des Moines, 110 Iowa, 175, 81 N. W. 476, 80 Am. St. Rep. 280.

vested by the judgment of a court, cannot be taken away by subsequent curative legislation, and they must thereafter be enforced regardless of such legislation.[3] This rule, however, does not apply to a suit brought for the enforcement of a public right which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation, and should not thereafter be enforced, although in so far as a private right has been incidentally established, as for special damages to the plaintiff or for his costs, it may not be taken away.[4]

The bringing of a suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands not when the suit was brought but when the judgment is rendered. United States v. Heinszen, 206 U. S. 370, 51 L. ed. 1098, 27 S. Ct. 742.

[3] Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435.
For a detailed discussion, see JUDGMENTS.

[4] Hodges v. Snyder, 261 U. S. 600, 67 L. ed. 819, 43 S. Ct. 435, affirming 45 S. D. 149, 186 N. W. 867, 25 A.L.R. 1128; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 S. Ct. 132; Stockdale v. Atlantic Ins. Co. 20 Wall. (U. S.) 323, 22 L. ed. 348; United States v. Klein, 13 Wall. (U. S.) 128, 20 L. ed. 519; Pennsylvania v. Wheeling & B. Bridge Co. 18 How. (U. S.) 421, 15 L. ed. 435.
Annotation: 25 A.L.R. 1145.

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TO

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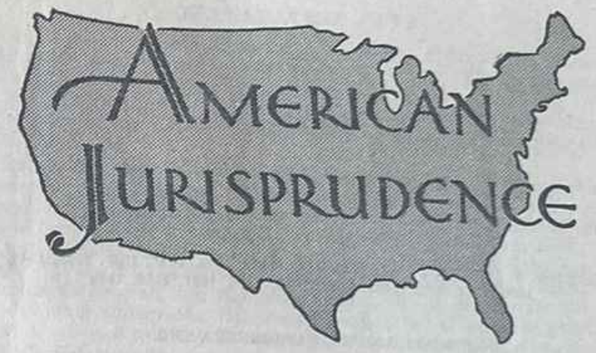

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